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Supreme Court, U.S.
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No. 10-470

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IN THE

Supreme Court of the United States

LAWRENCE RUSTON, JANET RUSTON,

Petitioners,

– v. –

THE TOWN BOARD FOR THE TOWN OF SKANEATELES, PAUL "BILL" PAVLUS, THADDEUS ASTEMBORSKI, BARBARA SPAIN, DAVID G. LAXTON, THEODORE MURDICK, THE PLANNING BOARD FOR THE TOWN OF SKANEATELES, MARK TUCKER, JOSEPH SOUTHERN, KENNETH JONES, ALAN BRIGGS, LEWIS WELLINGTON, DESSA BERGEN, ROBERT LOTKOWICTZ, THE VILLAGE OF SKANEATELES, JOHN DOE, JANE DOE 1-20,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Has *Village of Willowbrook v. Olech's* pleading protection of the class-of-one equal protection plaintiff who generally alleges different treatment from those similarly situated been taken away by *Ashcroft v. Iqbal*?

PARTIES TO THE PROCEEDING

Petitioners Lawrence Ruston and Janet Ruston were Plaintiffs in the District Court and Appellants in the Court of Appeals. The following entities and persons were Defendants in the District Court and Appellees in the Court of Appeals: the Town Board for the Town of Skaneateles, Paul "Bill" Pavlus, Thaddeus Astemborski, Barbara Spain, David G. Laxton, Theodore Murdick, the Planning Board for the Town of Skaneateles, Mark Tucker, Joseph Southern, Kenneth Jones, Alan Briggs, Lewis Wellington, Dessa Bergen, Robert Lotkowictz, and the Village of Skaneateles.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit affirming the dismissal of Petitioners' Amended Complaint, pursuant to Federal Rule of Civil Procedure 12(b)(6), is reported at 610 F.3d 55 (2d Cir. 2010); it is reprinted in the Appendix to the Petition at 4a.[1] The decision and order of the United States District Court for the Northern District of New York dismissing the Petitioners' Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) is not officially reported but can be found at *Ruston v. Town Bd. for Skaneateles*, 2009 WL 3199194, 2009 U.S. Dist. LEXIS 90964 (N.D.N.Y 2009); it is also appended, 15a, as is an earlier decision and order from the District Court, 38a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered July 8, 2010 (1a-3a). No petition for rehearing en banc was submitted. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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[1] All citations to the appendix herein will be represented by the respective page number followed by "a".

CONSTITUTIONAL PROVISIONS, RULES OF PROCEDURE, AND STATUTES INVOLVED

A. United States Constitutional Provisions Involved

The Fourteenth Amendment, U.S. Constitution, provides, in relevant part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

B. Rules of Civil Procedure Involved

Federal Rule of Civil Procedure 8 provides:

a. Claim for Relief. A pleading that states a claim for relief must contain:

(1) short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdic-

tion, and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

Federal Rule of Civil Procedure 12(b) provides:

How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;
(2) lack of personal jurisdiction;
(3) improper venue;
(4) insufficient process;
(5) insufficient service of process;
(6) failure to state a claim upon which relief can be granted; and
(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it

with one or more other defenses or objections in a responsive pleading or in a motion.

C. United States Code Provision Involved

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The federal courts, while declining to act as "zoning boards of appeal," have nonetheless provided redress to those property owners whose due process or equal protection rights come under attack by local authorities. This case presents the Court with an opportunity to decide whether such property owners' recourse to the federal courts is to be gravely curtailed.

A. Factual Background

Lawrence Ruston and Janet Ruston own and live on a 27-acre piece of lake front property in the Town of Skaneateles, just outside the neighboring Village of Skaneateles (64a). They have been trying to develop that property with a 12 to 14 lot subdivision for two decades (65a). The Town Board, as well as the Planning Board, for the Town of Skaneateles ("Town") and the Village of Skaneateles ("Village") have, in coordination, thwarted those efforts so as to prevent the subdivision and preserve the existing lake views of some interested and influential Town and Village officials (68a). In doing so, the Town and Village officials singled out the Rustons and treated them differently from other, similarly situated property owners.

Initially, the Town, upon receiving the Rustons' as-of-right subdivision proposal, informed the Rustons that their proposal would not even be considered unless the Rustons obtained permission to connect the proposed development to the Village's

sewer system, to which the Rustons had already been connected for decades (65-66a).

The Rustons complied, and applied to the Village for confirmation that the new proposed structures would be permitted connection to the Village system. In response, the Village adopted a new "non-discretionary" prohibition on any new or additional sewer hook-ups to properties outside the Village borders such as the Ruston property (66a). The Village was not bashful as to its motivation for adopting this policy; it was admittedly adopted in direct response to the Rustons' application (66a).

The Rustons' request for connection was then denied pursuant to this new blanket policy, which on its face was purportedly applicable to all property owners within the Town but outside the Village limits without regard to individual circumstances (66a). It mattered not to the Village that the structures on the Ruston property had enjoyed connection to the Village sewer system for decades, that the parties had existing contracts relating to those connections, that related sewer taxes were levied by the Village and paid by the Rustons, or that the sewer system had abundant excess capacity (64-66a, 70-71a).

While the Village strictly enforced this blanket policy against the Rustons, it made repeated exceptions for other, similarly situated property owners located in the Town but outside the Village who applied for such connections, including certain property owners named in the Amended Complaint

(81-84a). As alleged in the Amended Complaint, every single abutting property to the Rustons was provided the very connection denied to the Rustons in the face of this allegedly non-discretionary no-new-connections policy (81a-84a).

The Rustons later renewed their request for permission from the Town to subdivide their property (67a). The Rustons alleged that the Town conjured various means of delay and obfuscation. Among other tactics employed, the Town delayed by sending the Rustons back again to the Village for approval of additional sewer hook-ups, while knowing the Village would deny the request. When the Village eventually again denied the request based upon its purported blanket no-new-connections policy, the Rustons returned yet again to the Town. This time, however, with the approval of the New York State Department of Environmental Conservation, the County Health Department, and the Town's own engineer, the Rustons proposed a septic system rather than a connection to the Village plant.

As noted in the Amended Complaint, despite a series of irrational and baseless hurdles placed before them by Town officials, hurdles not imposed upon other similarly situated applicants, the Rustons persevered and satisfied all requirements placed before them. When all that remained was the Town's establishment of a formal sewer district for the otherwise fully approved subdivision, the Rustons demolished their home in reliance on the forthcoming final pro forma approval (87a).

Once the home was demolished, the Town intentionally hindered the Rustons' application. Among other things, it refused to consider the application while a lawsuit, commenced on behalf of certain interested municipal officials (including one who admitted he opposed the application because he believed it would harm him personally) was pending. The Town thereafter simply refused Plaintiffs' sewer district application a place on the Town Board's agenda for over a year (84-98a). Although the Town considered, acted upon, and granted other similar sewer district petitions (84a, at ¶¶ 103-04; 107a-108a), it refused to hear or act on the Rustons' application, until the Town officials were able to craft and enact local zoning laws targeting and foredooming the Rustons' subdivision proposal (90-91a).

When the Town finally placed the Rustons' application on a meeting agenda, it was considered immediately after the Town officials voted at the very same meeting to overhaul the Town of Skaneateles Zoning Law; this overhaul substantively gutted the Rustons' application and plans (98a). The overhaul consisted largely of narrowly tailored and expertly crafted amendments that forbade the creation of the very sewer district the Rustons proposed and otherwise proscribed the Rustons' development proposal with numerous provisions aimed with rifle shot accuracy at the Rustons' property alone (100a-105a). Indeed, the Town's own expert admitted that these zoning changes targeted the Rustons' subdivision proposal

(91a). The targeting worked; the Rustons' proposal had to be aborted.

B. The Procedural Background and The Decisions And Orders of the District Court and Second Circuit Court of Appeals

In July 2006, the Rustons sued under 42 U.S.C. §§ 1983 in the United States District Court for the Northern District of New York, on which 28 U.S.C. § 1331 and § 1343(a) bestowed jurisdiction (38a). The Rustons' complaint largely centered on equal protection and due process claims; it named as defendants the Village of Skaneateles, the Town Board of Skaneateles, the Town Planning Board, and several individual members of the Town Board and the Town Planning Board (38a). There ensued an initial Federal Rule of Civil Procedure 12(b)(6) motion, after which the Rustons filed an Amended Complaint (60a).

That Amended Complaint asserted against the Village only a class-of-one equal protection claim (61a-62a; 107a-108a). The Town also faced, *inter alia*, a class-of-one equal protection claim (61a-62a; 107a-108a). The Amended Complaint alleged that both the Village and the Town had irrationality and maliciously accorded more favorable treatment to property owners situated similarly to the Rustons. The Rustons' allegations against the Town took a more general form when referring to the two similarly situated property owners whose sewer district applications had been granted timely con-

sideration and who were not the target of zoning laws and conjured barriers; several similarly situated individuals were identified in the allegations against the Village (61a 62a; 65a-67a; 69a-71a; 84a; 91a; 95a; 97a-98a; 100a-105a; 107a-108a; 110a).

Defendants again moved under Federal Rule of Civil Procedure 12(b)(6). The District Court thereafter dismissed with prejudice all federal claims and declined to exercise supplemental jurisdiction over the state law claim (15a). *Ruston v. Town Bd. for Skaneateles*, 2009 WL 3199194, 2009 U.S. Dist. LEXIS 90964 (N.D.N.Y. 2009).

The District Court dismissed the class-of-one equal protection claim against the Village based on its understanding of *Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591 (2008). The Court reasoned that the Village enjoyed discretion over sewer connections and that *Engquist* precluded a class-of-one claim where such discretion existed (19a-20a). *Ruston*, 2009 WL 3199194, 2009 U.S. Dist. LEXIS 90964.

As to the class-of-one equal protection claim against the Town, it failed, according to the District Court, again owing to the court's interpretation of *Engquist* and the presence of local discretion in handling land use applications (29a). *Ruston*, 2009 WL 3199194, 2009 U.S. Dist. LEXIS 90964. It failed as well, the District Court added, because the Rustons had alleged only in a conclusory fashion animus and malice (30a). *Ruston*, 2009 WL 3199194, 2009 U.S. Dist. LEXIS 90964.

The Rustons took up an appeal but to no avail. The Court of Appeals for the Second Circuit affirmed the dismissal and judgment of the District Court (4a). *Ruston v. Town of Skaneateles*, 610 F.3d 55 (2d Cir. 2010).

The affirmance of the District Court as to the class-of-one equal protection claims, which gives rise to this petition, hinged most obviously on the Second Circuit's application of *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 137 (2009), and on its express reversal of its own precedent from six years before, *DeMuria v. Hawkes*, 328 F.3d 704 (2d Cir. 2003):

> District courts in our Circuit differ as to the impact of this pleading standard on a "class of one" equal protection claim. This uncertainty is attributable to the tension between this Court's decision in *DeMuria v. Hawkes*, 328 F.3d 704, 707 (2d Cir. 2003), which held under a now-obsolete pleading standard that a "class of one" claim is adequately pled ("albeit barely" so) even without specification of others similarly situated, and [ii] the Supreme Court's recent clarifications, which require that a complaint allege facts sufficient to establish "a plausible claim for relief," *Iqbal*, 129 S. Ct. at 1950; see also *Twombly*, 550 U.S. at 566.
>
> We hold that the pleading standard set out in Iqbal supersedes the "general allegation" deemed sufficient in *DeMuria*, 328 F.3d at 707. Under *Iqbal*, factual allegations must be

> sufficient to support necessary legal conclusions. *See Iqbal*, 129 S. Ct. at 1950-51. "A court can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.'" *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010) (quoting *Iqbal*, 129 S. Ct. at 1950). "We next consider the factual allegations in [the] complaint to determine if they plausibly suggest an entitlement to relief." *Iqbal*, 129 S. Ct. at 1951; *see also Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009).

Ruston v. Town Bd. for the Town of Skaneateles, 610 F.3d 55, 59 (2d Cir. 2010) (footnote omitted) (10a-11a).

Less obviously, the affirmance hinged on the Second Circuit's implicit belief that *Iqbal, supra,* overruled *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), with regard to the pleading requirements for a class-of-one claim. For *Olech, supra,* wholly anchored *DeMuria v. Hawkes*, 328 F.3d at 706, which the Court of Appeals declared was superseded by *Iqbal* (11a). *Ruston*, 610 F.3d at 59.

By the appellate court's resultant analysis, the Rustons' allegations did not "plausibly suggest an entitlement to relief." *Ruston*, 610 F.3d at 59. Having done away with the pleading standard of *DeMuria* and *Olech*, the Second Circuit found that the class-of-one equal protection claim against the Town failed for want of specific instances where the

Town considered applications by property owners situated similarly to the Rustons (11a-12a).[2] *Ruston*, 610 F.3d at 59. The class-of-one equal protection claim against the Village was fatally faulted because the Rustons failed to "establish" in the Amended Complaint an "extremely high degree of similarity" between themselves and those identified as more favorably treated by the Village (12a-13a). *Ruston*, 610 F.3d at 59-60.

[2] In fact, the Rustons had indeed alleged two similarly situated property owners with regard to the Town (84a, ¶¶ 103-04).

REASONS FOR GRANTING THE WRIT

I

THE COURT SHOULD DETERMINE WHETHER FEDERAL RULE OF CIVIL PROCEDURE 8 REQUIRES A CLASS-OF-ONE EQUAL PROTECTION PLAINTIFF TO IDENTIFY SPECIFIC INSTANCES OF THE SIMILARLY SITUATED BENEFITTING FROM BETTER TREATMENT:

A. In order to clarify whether the Court in *Ashcroft v. Iqbal* overruled *Village of Willowbrook v. Olech;*

To rule against the Rustons, the Second Circuit had to contend with *DeMuria v. Hawkes*, 328 F.3d 704 (2d Cir. 2003). And, therefore, it ultimately had to contend with *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), in which *DeMuria's* holding was grounded.

In *DeMuria*, the Second Circuit had reversed a district court which had dismissed as insufficient on the pleadings a class-of-one equal protection claim.

The *DeMuria* district court had, more precisely, found that:

> [T]he DeMurias had not set forth any "allegations identifying others similarly situated who were treated differently; or, for example, an allegation that officers handling similar disputes took adequate action, promptly applied for a warrant or made an arrest.

> Rather, the plaintiffs have merely alleged, in conclusory fashion, that Hawkes subjected them to a different standard of police protection". . .

DeMuria, 328 F.3d at 706-707. The district court, relying explicitly on *Olech*, held such lack of specificity fatal. *Id.* The Second Circuit disagreed, holding that *Olech* affirmatively supported the DeMurias:

> Our reading of *Olech* leads us to a different conclusion. First, the *Olech* opinion does not establish a requirement that a plaintiff identify in her complaint actual instances where others have been treated differently for the purposes of equal protection. Indeed, it appears that *Olech* herself did not "name names" in her complaint, but made the more general allegation that similarly situated property owners had been asked for a different easement. The Supreme Court found that such an allegation could "fairly be construed" as sufficient for stating an equal protection claim.

DeMuria, 328 F.3d at 707 (cite omitted).

Hence the DeMuria's "general allegation" met "the minimum level established by *Olech* for 'class of one' equal protection claims at the pleading stage." *Id.*

Undeniably then, when, in this case, the Second Circuit found that *Iqbal* had superseded *DeMuria*, it necessarily concluded that *Iqbal* had overruled

Olech with respect to pleading requirements for a class-of-one claim (11a). *Ruston*, 610 F.3d at 59. After all, *DeMuria* was not simply guided by *Olech*. It was avowedly "governed by" *Olech*. *DeMuria*, 328 F.3d at 706.

The Second Circuit's conclusion is implicit but nonetheless unmistakable. Only this Court, however, can say whether or not it was mistaken, i.e., whether *Iqbal* did indeed render *Olech* dead letter law, thereby raising the bar for future equal protection plaintiffs.

B. In order to resolve a conflict among the federal circuit courts as to the pre-discovery burdens borne by a plaintiff pursuing a class-of-one equal protection claim;

The Second Circuit's post-*Iqbal* treatment of class-of-one equal protection pleading requirements stands in stark contrast to the Third Circuit's treatment. The Second Circuit could not reconcile *Olech* and *Iqbal* (*see Point* I-A, supra), and so the Rustons lost. The Third Circuit, however, found *Olech* and *Iqbal* compatible and discerned no need to err on the side of severity when considering the pre-discovery pleadings of a class-of-one equal protection plaintiff.

In *Mann v Brenner*, 375 Fed. Appx. 232 (3d Cir. 2010) (116a-131a), the Third Circuit affirmed the district court's Federal Rule of Civil Prodecure 12(b)(6) dismissal of, *inter alia*, a class-of-one equal protection claim, a claim leveled without plaintiff

Mann's identifying individuals similar in situation but receiving better treatment than he. Yet Mann's failure to name names was not why the court deemed dismissal appropriate. No, the court took for granted that *Olech* would protect a plaintiff who, awaiting discovery, did not specify those persons more favorably treated though alike in circumstance. And it did so while fully aware of *Iqbal*:

> Although he alleges that "[o]ther citizens are not treated in this fashion, particularly the political leaders of the City of York" (*id.* at 41), Mann fails to plead that he was treated differently than other similarly situated individuals, that is, other property owners of blighted structures in the City of York. While *Olech* may not require plaintiffs to "identify in the complaint specific instances where others have been treated differently," *Phillips*, 515 F.3d at 245, the complaint is still deficient. Without any allegation regarding other blighted property owners, Mann simply cannot "nudge [his] claims across the line from conceivable to plausible." *Id.* at 234 (quoting *Twombly*, 550 U.S. at 570) . . . Mann's bald assertions that the defendants violated his right to equal protection because "he was selectively and vindictively cited and prosecuted by the City in an effort to force him into cooperation with York College" (App. 44), "amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim."

> *Iqbal*, 129 S. Ct. at 1951 (citation omitted). Accordingly, the District Court properly dismissed Mann's equal protection claim.

Mann, 375 Fed. Appx. 232 (127a).

In short, the problem, in the Third Circuit's view, was not plaintiff Mann's inability to specify in his complaint just which fellow property owners had fared better than he; *Olech* would have shielded him there. The problem was that the plaintiff compared his treatment to that enjoyed not by property owners but by political leaders. *Id.* Mann's lapse was one of categorization not overgenerality. Mann would have been safe in the Third Circuit had he averred, as did the Rustons, that he was being treated differently from similarly situated property owners.

Mann's predecessor in the Third Circuit was *Phillips v. County of Allegheny*, 515 F.3d 224 (3d Cir. 2008), a case decided after *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), but prior to *Iqbal*. Therein, the intertwining roots of this irreconcilable conflict between the Second and Third Circuits are plain.

In *Phillips*, the Third Circuit confirmed that the pleading requirements for class-of-one equal protection claims are governed by *Olech*, but also recognized that *Twombly* had introduced a new "plausibility paradigm for evaluating the sufficiency of complaints." *Phillips*, 515 F.3d at 230, 243. The Court then addressed the implications of this new plausibility requirement for *Olech* class-of-one equal protection claims.

Reflecting on its own paucity of jurisprudence in regard to such class-of-one claims, the Court looked to the Second Circuit for guidance, then explicitly adopted the pleading requirement for such claims applied by the Second Circuit in *DeMuria*. "Although our jurisprudence does not discuss class-of-one equal protection claims in detail, the Court of Appeals for the Second Circuit has gone further and we find its analysis of pleading requirements for these types of claims persuasive." *Id.* at 244. In the face of *Twombly*, the Third Circuit then went on to quote and adopt the holding of *DeMuria* as its own, holding as *DeMuria* did, that "the *Olech* decision does not establish a requirement that a plaintiff identify in a complaint specific instances where others have been treated differently for the purposes of equal protection." *Id.* at 245.[3]

The foregoing pleading standard adopted and applied by the Third Circuit is, of course, the very standard the Second Circuit has now explicitly overruled in *Ruston*.

The divergence between *Ruston*, on the one hand, and *Mann* and *Phillips*, on the other, defies denial. The class-of-one equal protection plaintiff bringing suit in the Second Circuit and the class-of-one equal protection plaintiff bringing suit in the Third Circuit each embark on an arduous journey. The

[3] Although the Court in *Phillips* ultimately dismissed the class-of-one claims, it did so only because the plaintiff failed to actually state in his complaint that he was indeed treated differently from others, and the Court directed that leave to amend be granted.

Second Circuit, though, now requires of its plaintiff a very steep climb at the outset (10a-11a). *Ruston*, 610 F.3d at 59. Such a steep climb at the pleading stage is not required in the Third Circuit; nor is it required by *Olech*.

Thus the person contemplating an equal protection action in the Second Circuit must not put too much stock in Federal Rule of Civil Procedure 8(a)(2) and its demand for a "short and plain statement of the claim showing that the pleader is entitled to relief." Nor should she put much hope in Federal Rule of Civil Procedure 26's promise of discovery to develop facts and uncover evidence.

She should know that she is expected to have all the facts of her case at the start, that her readiness for a Federal Rule of Civil Procedure 12(b)(6) motion will have to rival the readiness of a Third Circuit equal protection plaintiff braced for summary judgment. Indeed, it is telling that below the Second Circuit cited *Clubside, Inc. v. Valentin*, 468 F.3d 144 (2d Cir. 2006), in dismissing the Rustons' equal protection claims against the Village after consideration of those alleged to be similarly situated; *Clubside* came to the Second Circuit after a summary judgment denial, not a Fed. R. Civ. P. 12(b)(6) dismissal. In short, the Second Circuit expected the Rustons not just to allege but to "establish" at the pleading stage an "extremely high degree of similarity" between themselves and those who were treated differently (12a). *Ruston*, 610 F.3d at 59-60.

All Americans should live under the same Constitution. Mutually exclusive understandings of *Iqbal* should not make for one equal protection clause in the Second Circuit and another in the Third Circuit, with Circuits lining up on either side over time. A single equal protection clause should be equally enforceable in every federal court and by every citizen.

C. In order to provide guidance to courts, attorneys, and litigants regarding the true contours of *Iqbal*.

While ambiguity surrounding pleading requirements for the equal protection plaintiff is particularly troubling, in truth, it points to a larger confusion. *Iqbal* and its immediate forebears signaled a fundamental change in Federal Rule of Civil Procedure 12(b)(6)'s use. Still, the depth and breadth of that change remain unclear. To their credit, the courts have been candid in acknowledging this.

The Seventh Circuit, for instance, has recently stated:

> The question with which courts are still struggling is how much higher the Supreme Court meant to set the bar, when it decided not only *Twombly*, but also *Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). This is not an easy question to answer, as the thoughtful dissent from this opinion demon-

> strates. On the one hand, the Supreme Court has adopted a "plausibility" standard, but on the other hand, it has insisted that it is not requiring fact pleading, nor is it adopting a single pleading standard to replace Rule 8, Rule 9, and specialized regimes like the one in the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4(b)(2).

Swanson v. Citibank, N.A., 614 F.3d 400 (7th Cir. 2010).

The Third Circuit, in *In re Insurance Brokerage Antitrust Litigation*, __ F.3d __, 2010 WL 3211147, 2010 U.S. App. Lexis 17107 (3d Cir. 2010), made no secret of its own difficulties mastering *Iqbal*'s implications:

> Although *Fowler v. UPMC Shadyside*, 578 F.3d 203 (3d Cir. 2009), stated that *Twombly* and *Iqbal* had 'repudiated' the Supreme Court's earlier decision in *Swierkiewicz v Sorema N.A.*, 534 U.S. 506, 122, S. Ct. 992, 153 L.Ed.2d 1 (2002), see *Fowler*, 578 F.3d at 211, we are not so sure. Clearly, *Twombly* and *Iqbal* inform our understanding of *Swierkiewicz*, but the Supreme Court cited *Swierkiewicz* approvingly in *Twombly*, see 550 U.S. at 555-56, 127 S. Ct. 1955, and expressly denied the plaintiffs' charge that *Swierkiewicz* 'runs counter' to *Twombly*'s plausibility standard, id. at 569-70, 127 S. Ct. 1955.

See also Courie v. Alcoa Wheel & Forged Prods., 577 F.3d 625, 630 (6th Cir. 2009) ("Exactly how implausible is 'implausible' remains to be seen, as such a malleable standard will have to be worked out in practice").

Finally, most telling perhaps is the unacknowledged intra-circuit-court confusion which *Ruston* itself evinces. In *Ruston*, the Second Circuit sought to explain why its own district courts varied in their pleading demands for class-of-one equal protection claims (10a). *Ruston*, 610 F.3d at 59. In its explanation, the Second Circuit referred to the "now-obsolete pleading standard" under which *DeMuria* was decided (11a). *Ruston*, 610 F.3d at 59. *DeMuria*, again, turned on *Olech* and tumbled under *Iqbal*. *See* Point I-A, *supra*.

The Second Circuit's reference to pleading standard obsolescence after *Iqbal* startles in light of *Artista Records LLC v. Doe*, 604 F.3d 110 (2d Cir. 2010). There, the Second Circuit bordered on the emphatic in rejecting the "notion" that *Twombly* or *Iqbal* "heighted[ed] the pleading requirements." *Arista Records*, 604 F.3d at 119-21. It took mere months for the Court of Appeals to revise its view. The court went from black to white without passing through gray.

Sometimes significant change brings significant confusion. As the author of *Iqbal*, only this Court can quell the confusion arising in its wake. Only this Court can restore clarity to the starting point of every civil case brought before a federal court.

CONCLUSION

Based upon the foregoing, Petitioners Lawrence and Janet Ruston respectfully pray that a writ of certiorari be issued in this case to guard their rights to equal protection against overstated pleading requirements, lest local zoning and planning authorities count themselves exempt from minimal constitutional constraints and free to abuse targeted individuals.

Dated: October 4, 2010

Respectfully submitted,

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APPENDIX

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 8th day of July, two thousand and ten.

PRESENT: DENNIS JACOBS,
Chief Judge,

JOSEPH M. MCLAUGHLIN,
ROBERT D. SACK,
Circuit Judges.

Docket No. 09-4480-cv
[Oval Stamp:
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED: JUL 08, 2010
Catherine O'Hagan Wolfe, Clerk]

Lawrence Ruston, Janet Ruston,

Petitioner,

– *v.* –

The Town Board for the Town of Skaneateles, Paul "Bill" Pavlus, Thaddeus Astemborski, Barbara Spain, David G. Laxton, Theodore Murdick, The Planning Board for the Town of Skaneateles, Mark Tucker, Joseph Southern, Kenneth Jones, Alan Briggs, Lewis Wellington, Dessa Bergen, Robert Lotkowictz, The Village of Skaneateles,

Defendants-Appellees,

John Doe, Jane Doe 1-20,

Defendants.

JUDGMENT

The appeal in the above-captioned case from the United States District Court for the Northern District of New York was argued on the District Court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the District Court's judgment is AFFIRMED in accordance with the opinion of this court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[ROUND STAMP:
UNITED STATES
COURT OF APPEALS
SECOND CIRCUIT]

/s/ [stamped signature]
CATHERINE O'HAGAN WOLFE

Joy Fallek, Administrative Attorney

[STAMPED TEXT]

A True Copy
Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

[ROUND STAMP] UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

/s/ [STAMPED SIGNATURE]
CATHERINE O'HAGAN WOLFE

MANDATE ISSUED ON 8/18/2010

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2009

(Argued: April 15, 2010 Decided: July 8, 2010)

Docket No. 09-4480-cv

LAWRENCE RUSTON, JANET RUSTON,

Plaintiffs-Appellants,

– *v.* –

THE TOWN BOARD FOR THE TOWN OF SKANEATELES, PAUL "BILL" PAVLUS, THADDEUS ASTEMBORSKI, BARBARA SPAIN, DAVID G. LAXTON, THEODORE MURDICK, THE PLANNING BOARD FOR THE TOWN OF SKANEATELES, MARK TUCKER, JOSEPH SOUTHERN, KENNETH JONES, ALAN BRIGGS, LEWIS WELLINGTON, DESSA BERGEN, ROBERT LOTKOWICTZ, THE VILLAGE OF SKANEATELES,

Defendants-Appellees,

JOHN DOE, JANE DOE 1-20,

Defendants.

Before: JACOBS, *Chief Judge*,
MCLAUGHLIN & SACK, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Northern District of New York (Scullin, *J.*), dismissing on the pleadings a "class of one" equal protection claim by property owners, who were denied sewer hookups for their proposed subdivision, against the Village of Skaneateles, the Town Board, and the Town Planning Board (and individual members of the Boards). We affirm, relying on *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) to supersede *DeMuria v. Hawkes*, 328 F.3d 704 (2d Cir. 2003).

J. DAVID MACCARTNEY, JR., Esq. (Dennis E.A. Lynch, Esq., *on the brief*), Feerick Lynch MacCartney PLLC, South Nyack, NY *for Plaintiffs-Appellants.*

TERRY RICE, RICE & AMON, Suffern, NY *for Defendant-Appellee Village of Skaneateles*;

FRANK W. MILLER, ESQ., Law Firm of Frank Miller, East Syracuse, NY for *Defendants-Appellees Town Board for the Town of Skaneateles, Town Planning Board, and individual Town Defendants.*

DENNIS JACOBS, *Chief Judge*:

Plaintiffs-appellants Lawrence and Janet Ruston ("the Rustons") allege a "class of one" equal protection claim against local authorities that denied applications for a subdivision and additional sewer hookups for plaintiffs' lot fronting Lake Skaneateles.

I

The Rustons own a 27-acre lakefront lot within the Town of Skaneateles ("Town"), but outside of the Village of Skaneateles ("Village"). In 1990, the property had a single house, in which the Rustons lived, and three other structures, all connected to the Village's sewer system. They plead that the Town and the Village unconstitutionally frustrated their development plans.[1]

In 1990, the Rustons presented to the Town a plan to subdivide their lot and build a new housing development. The Town required the Rustons first to get permission from the Village to connect the proposed new homes to the Village sewer system. In 1991, the Village denied the Rustons' request. The Rustons, for a time, abandoned their efforts.

In 2000, the Rustons sought permission from the Town to subdivide their property and build a devel-

[1] This account of the dispute is derived from the Rustons' January 12, 2009 amended complaint, the factual allegations of which are accepted as true to the extent they are non-conclusory for the purposes of a motion to dismiss. *See Harris v. Mills*, 572 F.3d 66, 71-72 (2d Cir. 2009).

opment containing 14 residential units, each to be serviced by its own septic system in a new sewer district. The Rustons allege that the Town delayed and raised a series of obstacles to their application. While the application to the Town was stalled, the Rustons twice sought permission to connect their proposed new units to the Village sewer system. Both requests were denied. After the Village issued its final rejection in November 2004, the Rustons renewed the pending application to the Town to create the new sewer district for the development and to approve the new development as a whole. The Town delayed consideration until December 2005, by which time a new zoning law had been put into place. It is alleged that this law was designed to block the Rustons' proposed development, and did so: The Town considered the Rustons' development application in December 2005 and, citing the new zoning law, denied it.

In July 2006, the Rustons filed a complaint under 42 U.S.C. §§ 1983 and 1985 in the United States District Court for the Northern District of New York (Scullin, *J.*) against the Village of Skaneateles and the Town Board of Skaneateles, the Town Planning Board, as well as several individual members of the Town Board and the Town Planning Board (collectively, the "Town defendants"). This (first) complaint alleged: (1) conspiracy to violate the Rustons' civil rights; (2) violation of their substantive due process rights; and (3) violation of their equal protection rights. Additionally, the Rustons brought claims against the Town defendants claiming that the

Town's new zoning law was unconstitutionally vague, and violated their substantive due process rights and their right to equal protection. The Rustons also asserted a state law claim against the Town defendants to enforce vested property rights.

The Village moved to dismiss under Rule 12(b)(6), joined by the Town defendants (as relevant to them). On December 24, 2008, the district court dismissed: (1) with prejudice as to the § 1985 conspiracy claims against all defendants; (2) with prejudice as to the substantive due process claim against the Village; but (3) *without* prejudice as to the equal protection claim against the Village. *See Ruston v. Town Bd. for Skaneateles*, No. 5:06-CV-927, 2008 U.S. Dist. LEXIS 104129 (N.D.N.Y Dec. 24, 2008).

On January 12, 2009, the Rustons filed an amended complaint, renewing all claims against the Town defendants (except the § 1985 conspiracy claims), and re-casting the equal protection claim against the Village. The Town defendants and the Village again moved to dismiss, and the district court dismissed with prejudice all federal claims against the Town defendants and the Village; and, having dismissed all federal law claims, the court declined to exercise supplemental jurisdiction over the Rustons' state law claim, and dismissed it without prejudice. *See Ruston v. Town Bd. for Skaneateles*, No. 5:06-CV-927, 2009 U.S. Dist. LEXIS 90964 (N.D.N.Y Sept. 30, 2009).

The Rustons appeal, *inter alia*, the dismissal of their equal protection claim.[2] We affirm, holding that the complaint failed to state an equal protection claim on which relief could be granted.

II

"We review a district court's grant of a motion to dismiss under Rule 12(b)(6) *de novo*." *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 115 (2d. Cir 2008) (internal quotation marks omitted).

The Rustons argue that they sufficiently alleged a "class of one" equal protection claim against the Town defendants and the Village. *See generally, Engquist v. Or. Dep't of Agric.*, 553 U.S. 591 (2008). The Supreme Court has "recognized successful equal protection claims brought by a 'class of one,'

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[2] The Rustons assert two additional grounds for appeal, both meritless.

As to their substantive due process claim, they had no federally protected property right to approval of the sewer hookups or the development itself (as approval of either required a favorable exercise of discretion), *see Clubside, Inc. v. Valentin*, 468 F.3d 144, 154 (2d Cir. 2006); *RRI Realty Corp. v. Inc. Vill. of Southampton*, 870 F.2d 911, 918 (2d Cir. 1989), and they did not allege governmental behavior that "may fairly be said to shock the contemporary conscience," *see Velez v. Levy*, 401 F.3d 75, 93 (2d Cir. 2005) (internal quotation marks omitted).

As to the facial constitutionality of the new zoning law, the Rustons failed to allege that "'no set of circumstances exists under which the [law] would be valid.'" *See Kittay v. Giuliani*, 252 F.3d 645, 647 (2d Cir. 2001) (*quoting United States v. Salerno*, 481 U.S. 739, 745 (1987)).

where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."[3] *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam).

The Supreme Court has recently clarified the pleading standard required to withstand a motion to dismiss. "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (internal citation omitted). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.*; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 565-66 (2007). District courts in our Circuit differ as to the impact of this pleading standard on a "class of one" equal protection claim.[4] This uncer-

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[3] The Supreme Court arguably added a third requirement to "class of one" claims in *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591 (2008): that the offending governmental action at issue be non-discretionary. As we hold that the Rustons have failed to adequately allege a "class of one" claim regardless of whether the governmental action at issue was non-discretionary we have no need to explore *Engquist*.

[4] *Compare Toussie v. Town Bd. of E. Hampton*, No. 08-CV-1922, 2010 U.S. Dist. LEXIS 13435, at *16-17 (E.D.N.Y.

tainty is attributable to the tension between [i] this Court's decision in *DeMuria v. Hawkes*, 328 F.3d 704, 707 (2d Cir. 2003), which held under a now-obsolete pleading standard that a "class of one" claim is adequately pled ("albeit barely" so) even without specification of others similarly situated, and [ii] the Supreme Court's recent clarifications, which require that a complaint allege facts sufficient to establish "a plausible claim for relief," *Iqbal*, 129 S. Ct. at 1950; *see also Twombly*, 550 U.S. at 566.

We hold that the pleading standard set out in *Iqbal* supersedes the "general allegation" deemed sufficient in *DeMuria*, 328 F.3d at 707. Under *Iqbal*, factual allegations must be sufficient to support necessary legal conclusions. *See Iqbal*, 129 S. Ct. at 1950-51. "A court 'can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.'" *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010) (*quoting Iqbal*, 129 S. Ct. at 1950). "We next consider the factual allegations in [the] complaint to determine if they plausibly suggest an entitlement to relief." *Iqbal*, 129 S. Ct. at 1951; *see also Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009).

The Rustons' complaint fails to allege facts that "plausibly suggest an entitlement to relief." As to the Town defendants, the Rustons' argument appears to be that the Town refused to consider

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Feb. 17, 2010) *with Crippen v. Town of Hempstead*, No. 07-CV-3478, 2009 U.S. Dist. LEXIS 24820, at *33 (E.D.N.Y. Mar. 25, 2009) (decided before *Iqbal* but after *Twombly*).

their application while considering applications submitted by those similarly situated. However, the Rustons do not allege specific examples of the Town's proceedings, let alone applications that were made by persons similarly situated. The equal protection claim as to the Town defendants therefore fails for lack of factual allegations to support the legal conclusion.

As to the Village, the Rustons argue that other, similarly situated properties were allowed to connect to the Village's sewer system. The Rustons do identify several properties that allegedly were allowed to connect to the Village's sewer system, all of them individual homes or businesses that (like the Rustons' land) were outside the Village but within the Town. We credit, as we must, the factual allegations that these other properties received sewer access while the Rustons' property did not. Nevertheless the complaint fails to state a claim that would support relief.

"[C]lass-of-one plaintiffs must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves." *Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006). "Accordingly, to succeed on a class-of-one claim, a plaintiff must establish that (i) no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy; and (ii) the similarity in circumstances and difference in treatment are sufficient to exclude the

possibility that the defendants acted on the basis of a mistake." *Id.* (internal quotation marks omitted).

Under this standard, none of the properties cited by the Rustons suffice: a house built in 1987; a country club that was renovated in "the early 1990's"; two neighboring properties—"connected to the Village sewer system for decades"—that are not further described; a house built "in or around 2004"; a "luxury spa" built "in the late 1990's"; and a "large commercial building." None of these properties is similar to the Rustons' proposed 14-home development, let alone so similar that no rational person could see them as different: some are commercial properties versus the residential properties at issue, *see Campbell v. Rainbow City*, 434 F.3d 1306, 1314-15 (11th Cir. 2006) (properties that differed in land use were not prima facie similarly situated); *see also Clubside, Inc.*, 468 F.3d at 159, and the residential connections were single homes, not a new development as proposed by the Rustons, *see id.* at 159-60 (projects involving "different types of housing and density levels" were not similarly situated as a matter of law).

As the Rustons fail to allege that properties sufficiently similar to theirs were treated more favorably by either the Village or the Town, they have failed to state a "class of one" equal protection claim.

* * *

We have considered the Rustons' other arguments and find them unavailing. For the foregoing reasons, the judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

5:06-CV-927
(FJS/GHL)

LAWRENCE RUSTON and JANET RUSTON,

Plaintiffs,

v.

THE TOWN BOARD FOR THE TOWN OF SKANEATELES; PAUL "BILL" PAVLUS; THADDEUS ASTEMBORSKI; BARBARA SPAIN; DAVID G. LAXTON; THEODORE MURDICK; THE PLANNING BOARD FOR THE TOWN OF SKANEATELES; MARK TUCKER; JOSEPH SOUTHERN; KENNETH JONES; ALAN BRIGGS; LEWIS WELLINGTON; DESSA BERGEN; ROBERT LOTKOWICTZ; and THE VILLAGE OF SKANEATELES,

Defendants.

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SCULLIN, Senior Judge

MEMORANDUM DECISION & ORDER

I. INTRODUCTION

On January 12, 2009, Plaintiffs filed their amended complaint asserting four causes of action: (1) a substantive due process claim; (2) a class-of-one equal protection claim; (3) a facial challenge to provisions of the Town of Skaneateles' Zoning Code, Subdivision Regulations, and Comprehensive Plan; and (4) a vested-rights claim. Plaintiffs assert these claims against all Defendants except Defendant Village of Skaneateles ("Village"), against

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[1] Plaintiffs initially filed a complaint asserting three causes of action against Defendant Village: a § 1985(3) conspiracy claim, a substantive due process claim, and an equal protection claim. On Defendant Village's motion to dismiss, the Court dismissed all the claims against Defendant Village, but only dismissed the equal protection claim without prejudice and with leave to amend. *See* Memorandum-Decision and Order dated December 22, 2008, at 17-18.

whom Plaintiffs only assert their equal protection claim.[1]

Currently before the Court are Defendant Village's motion to dismiss the equal protection claim for failure to state a claim and the motion of the other Defendants to dismiss the claims against them on the following grounds: (1) failure to plead personal involvement of the individual Defendants; (2) the Town Planning Board is not a proper Defendant; (3) the Town Board members are entitled to legislative immunity; and (4) failure to state a claim.

II. BACKGROUND

Plaintiffs own twenty-seven acres of property in the Town of Skaneateles ("Town"), but outside Defendant Village. Starting first from 1990-1991 and again from 2000 until the filing of this action, Plaintiffs have endeavored to subdivide and develop their property.

Defendant Town Board for the Town of Skaneateles ("Town Board") is the municipal corporation with jurisdiction over the Town. Defendant Planning Board for the Town of Skaneateles ("Planning Board") is a delegated entity in the Town that reviews site plans. At the relevant time, Defendant Pavlus was the Supervisor and Chairman of Defendant Town Board and Defendants Astemborski, Spain, Laxton, and Murdick were members of Defendant Town Board (collectively the "Individual Town Board Defendants"). At the relevant time, Defendant Tucker was the Chairman of Defendant

Planning Board and Defendants Southern, Jones, Briggs, Wellington, Bergen, and Lotkowictz were members of Defendant Planning Board (collectively the "Individual Planning Board Defendants"). These Defendants constitute the Town Defendants. Defendant Village is a municipal corporation.

III. DISCUSSION

A. Standard of review

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2). As the Supreme Court explained in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), Rule 8's pleading standard does not require "detailed factual allegations," but it does require "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action . . . ." *Id.* at 555 (citations omitted). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, No. 07-1015, __ U.S. __, 129 S. Ct. 1937, 1949 (2009) (quoting [*Twombly*, 550 U.S.], at 557, 127 S. Ct. 1955).

As the Supreme Court explained in *Iqbal*, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting [*Twombly*, 550 U.S.], at 570, 127 S. Ct. 1955). "A claim has facial plausibility when the plaintiff pleads factual content that allows the

court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing [*Twombly*, 550 U.S.], at 556, 127 S. Ct. 1955).

Furthermore, the Court stated that there are "[t]wo working principles [that] underlie [its] decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions . . . [and] [s]econd, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . ." *Id.* at 1949-50 (internal citations omitted). The Court also stated that

> [d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief." Fed. R. Civ. Proc. 8(a)(2).

Id. at 1950 (internal quotation and citations omitted).

Therefore, the Court instructed that, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.*

B. Defendant Village's motion to dismiss Plaintiffs' class-of-one equal protection claim

The Supreme Court has recognized a class-of-one equal protection claim where a plaintiff "does not allege class-based discrimination, but rather that he . . . has been irrationally singled out as a 'class of one.'" *Marino v. Shoreham-Wading River Cent. Sch. Dist.*, No. CV-08-0825, 2008 WL 5068639, *6 (E.D.N.Y. Nov. 20, 2008) (citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000)). Since Plaintiffs have not alleged membership in any identifiable group against which Defendants have discriminated, the Court will analyze this claim as a class-of-one equal protection claim.

In *Engquist v. Oregon Dep't of Agric.*, __ U.S. __, 128 S. Ct. 2146 (2008), the Supreme Court added an additional limit to class-of-one claims, that such claims must result from a non-discretionary action. *See Marino*, 2008 WL 5068639, at *6-*7 (citing *Engquist*, 128 S. Ct. 2153-54). Accordingly, "[f]ollowing *Engquist*, in order to state an equal protection 'class of one' claim, a plaintiff must allege (1) that she was treated differently from others similarly situated in all relevant respects; (2) that defendants had no rational basis for the differential treatment, *see Olech*, 528 U.S. at 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060; and (3) that the differential treatment resulted from a non-discretionary state action, *Engquist*, 128 S. Ct. at 2154." *Id.* at *7.

Plaintiffs' allegations in support of their equal protection claim against Defendant Village all relate to the decision to deny Plaintiffs sewer-system access for the proposed development. In its prior decision, this Court discussed the discretionary nature of the decision to grant sewer access when discussing Plaintiffs' previously asserted substantive due process claim against Defendant Village and concluded that Plaintiffs lacked a property interest because Defendant Village had discretion. *See* Memorandum-Decision and Order dated December 22, 2008, at 8-11. The only new allegation related to this issue is Plaintiffs' assertion that Defendant Village denied them sewer access "notwithstanding the fact that the Plaintiffs had been paying an ad valorem sewer tax . . . ." *See* Amended Complaint at ¶ 44.

With respect to Plaintiffs' alleged "*ad valorem* sewer tax," this Court previously declined to address the issue finding that Plaintiffs had not alleged payment of such a tax in their complaint. *See* Memorandum-Decision and Order dated December 22, 2008, at 9 n.13. In their amended complaint, Plaintiffs now assert only one allegation of an "*ad valorem* sewer tax" in paragraph 44 and allege no facts to support that such a tax was levied or paid. In its reply papers, Defendant Village submitted the sewer bills for Plaintiffs' property from February 10, 2003, to February 1, 2009. *See* Declaration of Terry Rice dated March 23, 2009, at Exhibit "A." These bills all show charges based on volume consumed multiplied by a rate, no other special assessments, and no mention or relation to

the value of Plaintiffs' property receiving the sewage services. *See id.*

Moreover, the case that Plaintiffs cite to support their position does not mention an "*ad valorem* tax" but rather a special assessment for the construction of a sewer. *See HBP Assocs. v. Marsh*, 893 F. Supp. 271, 279 (S.D.N.Y. 1995) (finding that "an annual special assessment for the construction and maintenance of the sewer facility" would create an entitlement to sewer services). An "*ad valorem* tax" is "[a] tax imposed proportionally on the value of something (esp. real property), rather than on its quantity or some other measure." Black's Law Dictionary 1496 (8th ed. 2004); *see also USA Recycling Inc. v. Town of Babylon*, 66 F.3d 1272, 1286 (2d Cir. 1995) (distinguishing between taxes on property owners on an "*ad valorem* basis" or in proportion to the value of the property and those on a "benefit basis" or in proportion to the actual benefit conferred on the property); *AMPCO Printing-Advertisers' Offset Corp. v. City of N.Y.*, 14 N.Y.2d 11, 22 (1964) ("The phrase 'ad valorem' means 'according to the value' and is used in the field of taxation to designate an assessment of taxes against property at a certain rate upon its value . . . [that] is always based upon ownership of property . . . .").

The payments Plaintiffs apparently made to Defendant Village do not appear to be an *ad valorem* tax as they were based on the quantity of volume used and not the value of Plaintiffs' property. Furthermore, there does not appear to be any special assessment beyond the sewer rents that Plaintiffs have paid to Defendant Village for the creation

or maintenance of a sewer facility, as in *HBP Assocs.* Although the Court must accept factual allegations in the amended complaint as true, Plaintiffs' allegation that they have paid an *ad valorem* tax is merely a conclusory legal allegation that this Court does not need to credit. *See Iqbal*, 129 S. Ct. at 1949. Therefore, the Court finds that Plaintiffs' sole conclusory allegation regarding such a tax is insufficient to allege a tax paid to create an entitlement that would remove Defendant Village's discretion with respect to sewage connections; and, thus, Plaintiffs have failed to state a class-of-one equal protection claim against Defendant Village. Accordingly, the Court grants Defendant Village's motion to dismiss Plaintiffs' equal protection claim.

C. Town Defendants' motion to dismiss

1. Defendant Town Planning Board

Defendants assert that Defendant Town Planning Board is not a proper defendant because it is a municipal department not subject to suit in favor of suing the municipality. Plaintiffs concede that the action against Defendant Town Planning Board is duplicative. Therefore, the Court dismisses Plaintiffs' claims against Defendant Town Planning Board. Likewise, the Court dismisses the claims against the Individual Defendants in their official capacities as redundant. *See Wallikas v. Harder*, 67 F. Supp. 2d 82, 83 (N.D.N.Y. 1999) (finding that where the plaintiff has sued the municipality, official capacity claims against indi-

vidual defendants are redundant (citations omitted)).

2. Individual Town Defendants

a. Legislative immunity

Defendants assert that the individual Town Defendants are entitled to absolute legislative immunity for § 1983 claims, which requires dismissal of all such claims.

Legislative immunity provides absolute immunity to local legislators for acts "undertaken '"in the sphere of legitimate legislative activity."'" *Almonte v. City of Long Beach*, 478 F.3d 100, 106 (2d Cir. 2007) (quotation omitted). Such acts are not limited to the casting of a vote; rather, legislative activity includes "all aspects of the legislative process," including discussions and meetings with people outside the legislature. *Id.* at 107. However, courts have distinguished between situations where a single issue relevant to a single individual is resolved and a "'broad, prospective policy-making that is characteristic of legislative action.'" *Id.* at 108 (quotation omitted).

Plaintiffs' amended complaint alleges both legislative and non-legislative activity on the part of Defendants. *See, e.g.*, Amended Complaint at ¶ 180 (alleging legislative activity—the enactment of new Town Zoning Code provisions); ¶¶ 108-115 (alleging non-legislative obstruction and delay of Plaintiffs' applications). Plaintiffs' first two causes of action (substantive due process and equal protection) encompass both legislative and non-legislative activity. Therefore, at this stage of the

litigation, the Court cannot grant any of the individual Defendants legislative immunity with regard to those causes of action.

Plaintiffs' third cause of action is a facial challenge on various grounds to the "new Town Zoning Code, Subdivision Regulations and Comprehensive Plan." *See* Amended Complaint at ¶¶ 219-228. Defendant Town Board enacted the Zoning Code and Subdivision Regulations, *see id.* at ¶ 164, and the Comprehensive Plan, *see id.* at ¶ 138. The Court finds that the Individual Town Board Defendants are entitled to absolute legislative immunity for their legislative activities in enacting the new code, regulations, and plan. Therefore, the Court dismisses Plaintiffs' third cause of action against the Individual Town Board Defendants.

b. Personal involvement

To support a § 1983 claim, a plaintiff must show personal involvement of individual defendants in the alleged constitutional deprivations. *See Zdzieblos-ki v. Town of E. Greenbush*, 336 F. Supp. 2d 194, 201-02 (N.D.N.Y. 2004) (citations omitted). Where the alleged deprivations occurred as a result of a board vote, involvement as a voting member of the board may be sufficient personal involvement. *Cf. id.* at 202 (finding town attorney who advised but did not vote did not sufficiently participate to create liability). Plaintiffs' amended complaint alleges violations as a result of the votes of both Defendant Town Board, *see, e.g.*, Amended Complaint at ¶ 165 (application for a new sewer district), and Defendant Town Planning Board, *see, e.g., id.* at ¶ 73

(SEQRA declaration). Those allegations support Plaintiffs' first two causes of action. As all of the Individual Defendants are alleged to be members of either Defendant Town Board or the Town Planning Board, the Court finds that Plaintiffs have alleged sufficient personal involvement to survive a motion to dismiss.

As noted above, Plaintiffs' third cause of action is limited to the legislative activity of Defendant Town Board. Therefore, with respect to that cause of action, the Court finds that the Individual Planning Board Defendants were not voting members of Defendant Town Board and, accordingly, were not personally involved in the enactment of the alleged unconstitutional legislation. *Cf. Zdziebloski*, 336 F. Supp. 2d at 202. Therefore, the Court dismisses Plaintiffs' third cause of action against the Individual Planning Board Defendants for lack of personal involvement.

3. Substantive due process claim

"[A] party asserting a deprivation of substantive due process must first establish a valid property interest within the meaning of the Constitution . . . [and] must demonstrate that the defendant acted in an arbitrary or irrational manner in depriving him of that property interest." *Crowley v. Courville*, 76 F.3d 47, 52 (2d Cir. 1996) (citation omitted); *see also Clubside, Inc. v. Valentin*, 468 F.3d 144, 152 (2d Cir. 2006) (quotation omitted).

a. Property interest

To establish a property interest, a plaintiff must show "a '"legitimate claim of entitlement."'" *Crowley*, 76 F.3d at 52 (quotations omitted). "'The [strict entitlement] analysis focuses on the extent to which the deciding authority may exercise *discretion* in arriving at a decision, rather than on an estimate of the probability that the authority will make a specific decision.'" *Id.* (quoting *Zahra [v. Town of Southold*,] 48 F.3d [674,] 680 [(2d Cir. 1995)]). If the governmental entity possesses discretion, the plaintiff does not have a legitimate entitlement and, therefore, lacks a property interest. *See id.*

Since the Constitution does not create property interests, courts look to other existing rules, such as state law, that support claims of entitlement. *See Cedarwood Land Planning v. Town of Schodack*, 954 F. Supp. 513, 521 (N.D.N.Y. 1997) (citations omitted). New York law can support such a property interest in "vested rights" in property development. *See id.* (quotation and other citations omitted). For purposes of argument, the Court will assume that Plaintiffs can establish "vested rights" under either of their theories under New York law.[2] However, even assuming "vested rights,"

2 Plaintiffs assert that they have vested rights based on the following theories: (1) their expenditures and demolition of the large house on their property pursuant to the theory expressed in *Town of Orangetown v. Magee*, 88 N.Y.2d 41 (1996); and (2) the special-facts exception based on Defendants' delay pursuant to *In re Jayne Estates, Inc. v. Raynor*, 22 N.Y.2d 417 (1968).

under New York law, planning boards have discretion to approve or deny applications for subdivisions. *See id.* at 524-25 (citing planning board's wide discretion whether to approve a subdivision plan (citations omitted)). Accordingly, the Court finds that Plaintiffs have failed to allege a property interest within the meaning of the Constitution to support their substantive due process claim.

b. Defendants' conduct

Even if Plaintiffs had pled a valid property interest, substantive due process is an outer limit on governmental action; therefore, it does not forbid arbitrary and capricious conduct correctable in a state-court review of an administrative action. Rather, "[s]ubstantive due process standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority." *Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999) (citations omitted). "'Only a substantial infringement of state law prompted by personal or group animus, or a deliberate flouting of the law that trammels significant personal or property rights, qualifies for relief under § 1983.'" *Id.* (quoting *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir. 1988)).

As this Court already noted in its prior decision, the conduct must be "'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'" *Bullock v. Gerould*, 338 F. Supp. 2d 446, 451 (W.D.N.Y. 2004) (quoting [*County of Sacramento v.] Lewis*, 523 U.S. [833,] 848 n.8, 118 S. Ct. 1708 [(1998)]) (citing *Tenenbaum v. Williams*,

193 F.3d 581, 600 (2d Cir. 1999)). Although the *Bullock* court found that the allegations in the complaint established wrongful conduct for improper motives, it concluded that those allegations did not state a substantive due process claim. *See id.* "'The protections of substantive due process are available only against egregious conduct which goes beyond merely "offend[ing] some fastidious squeamishness or private sentimentalism" and can fairly be viewed as so "brutal" and "offensive to human dignity" as to shock the conscience.'" *Id.* (quoting *Smith ex rel. Smith v. Half Hollow Hills Cent. School Dist.*, 298 F.3d 168, 173 (2d Cir. 2002)); *see also Eichenlaub v. Township of Indiana*, 385 F.3d 274, 285 (3d Cir. 2004) (finding that the alleged selective enforcement of zoning provisions, unannounced and unnecessary inspection and enforcement actions, delay of permits and approvals, increases of tax assessments, and maligning and muzzling of the plaintiffs are examples of disagreements that frequently arise in planning disputes and such conduct does not shock the judicial conscience; and, noting the lack of self-dealing, corruption, interference with an otherwise constitutionally protected activity, bias against an ethnic group, or forced seizure and sale, i.e., virtual "taking," any of which might shock the judicial conscience (citations omitted)).

After reviewing Plaintiffs' amended complaint in a light most favorable to them, the Court finds that Plaintiffs have not alleged conscience-shocking conduct on the part of Defendants. Plaintiffs' allegations consist of the types of disputes and conduct

that arise in planning disputes as the Third Circuit described in *Eichenlaub*. Accordingly, the Court finds that Plaintiffs have failed to allege the requisite conscience-shocking conduct to support a plausible substantive due process claim.

4. Class-of-one equal protection claim

As noted above, "[f]ollowing *Engquist*, in order to state an equal protection 'class of one' claim, a plaintiff must allege (1) that she was treated differently from others similarly situated in all relevant respects; (2) that defendants had no rational basis for the differential treatment, *see Olech*, 528 U.S. at 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060; and (3) that the differential treatment resulted from a non-discretionary state action, *Engquist*, 128 S. Ct. at 2154." *Marino*, 2008 WL 5068639, at *7. General allegations of disparate treatment are sufficient to survive a motion to dismiss. *See DeMuria v. Hawkes*, 328 F.3d 704, 707 (2d Cir. 2003). "[T]he allegation of an impermissible motive and of animus is sufficient to establish an equal protection issue[;] . . . a plaintiff must show either lack of rational basis or animus under *Olech*." *Id.* (citation omitted). A plaintiff must also allege intentional disparate treatment. *See id.*

Plaintiffs' equal protection claim relies on substantially the same allegations as their substantive due process claim. Therefore, the Court finds that Defendants' discretion in handling Plaintiffs' land use applications is sufficient to find, pursuant to *Engquist* as a matter of law, that Plaintiffs have failed to state an equal protection claim. Further-

more, the Court finds that Plaintiffs have only alleged conclusory statements of animus and that allegations of differential treatment do not, standing alone, show animus or malice. *See Crowley*, 76 F.3d at 53. Similarly, the Court finds that Plaintiffs' allegations that Defendants were opposed to Plaintiffs' development plans do not demonstrate the requisite animus against Plaintiffs themselves. Finally, given Defendants' discretion in handling Plaintiffs' applications, the Court finds that Plaintiffs have only alleged conclusory allegations that Defendants lacked a rational basis for their actions. For all these reasons, the Court dismisses Plaintiffs' equal protection claims.

5. Facial challenges to Defendants' ordinances

a. Void for vagueness claim

Ordinances may be void for vagueness if their prohibitions are not clearly defined to provide fair warning and prevent "unrestricted delegations of power which facilitate arbitrary and discriminatory enforcement." *ABN 51st St. Partners v. City of N.Y.*, 724 F. Supp. 1142, 1147 (S.D.N.Y. 1989) (citation omitted). Economic regulations with civil penalties "are subject to 'a less strict vagueness test'"; zoning ordinances may be unconstitutionally vague where they do not specify a standard for conduct such that they offend due process. *Id.* (quotation omitted).

In this case, Plaintiffs challenge Town of Skaneateles Zoning Law ("Zoning Law") § 148-9(C) and (G)(1) and specifically the terms "conservation analysis"

and "conservation value" as permitting the Town Planning Board "unabridged and sole discretion" to eliminate development on subjective grounds. *See* Amended Complaint at ¶ 195. Zoning Law § 148-9(C) provides that certain subdivisions must comply with Zoning Law § 148-9(G). Zoning Law § 148-9(G)(1)(a)[1]-[5] clearly defines "lands with conservation value." *See* Zoning Law § 148-9(G)(1)(a). Furthermore, the "conservation analysis" is clearly defined as the process of requiring an applicant to submit certain information to be incorporated into a sketch plan. *See* Zoning Law § 148-9(G)(1). The sketch plan will show preferred locations for development and preservation. *See* Zoning Law § 148-9(G)(1)(b)-(c). The only discretion that the Planning Board retains is whether to seek a "conservation easement." *See* Zoning Law § 148-9(G)(1)(d). The term "conservation easement" is defined as "[a] perpetual restriction on the use of land, created in accordance with the provisions of § 49, Title 3, of the Environmental Conservation Law or § 247 of the General Municipal Law, for the purposes of conservation of open space, agricultural land and natural, cultural, historic and scenic resources." *See* Zoning Law § 148-56.

As a review of this ordinance demonstrates, it does not imbue the Planning Board with unlimited discretion. Rather, it provides an information-gathering mechanism to determine whether to seek a conservation easement pursuant to New York law. Therefore, the Court dismisses Plaintiffs' void for vagueness claim.

b. Substantive due process and equal protection claims

"To challenge the facial validity of a zoning regulation on substantive due process grounds, [a plaintiff] must allege that (1) the regulation on its face deprives him of a constitutionally protected property interest, and (2) the regulation lacks any rational relationship to a legitimate government interest." *Kittay v. Giuliani*, 112 F. Supp. 2d 342, 352 (S.D.N.Y. 2000) (citations omitted). Courts perform such analysis under the guidance that "'federal courts should not become zoning boards of appeal' when reviewing land use determinations." *Id.* (quoting *Sullivan v. Town of Salem*, 850 F.2d 81, 82 (2d Cir. 1986)). Even if a plaintiff can show a constitutionally protected property interest, he must "satisfy the heavy burden of demonstrating that the [challenged laws] on their face lack *any* rational relationship to a legitimate governmental interest." *Id.* (citations omitted).

The Court has already determined that Plaintiffs have failed to allege a constitutionally protected property interest. Even if they had alleged such an interest, there can be no doubt that the provisions about which they complain—those dealing with (1) the expansion of Defendant Village's sewage capacity; (2) the prohibition against new sewer districts in Skaneateles Lake's watershed; (3) the prohibition against private sewage systems serving multiple owners; (4) the limit on building in areas that are in a rural pattern and to maintain large areas of open space undeveloped; (5) the lakefront's

setback; (6) the expansion and occupancy of boathouses; and (7) density requirements and steep slope provisions, *see* Amended Complaint at ¶¶ 174-198,—are rationally related to a legitimate government interest regarding land use and development. *See Kittay*, 112 F. Supp. 2d at 353 (noting that the courts do not require that the legislative acts actually advance the purposes, but whether "'the governmental body could have had no legitimate reason for its decision.'" (quotation omitted)).

Similarly, with a facial equal protection challenge, "[w]here neither a fundamental right nor a suspect class is implicated, a statute's treatment of different classes carries with it a heavy presumption of constitutionality, and a statute is constitutionally deficient only where no rational relationship exists between the classification and a legitimate legislative concern." *Id.* (citations and footnote omitted). Even assuming that the challenged legislation creates different classes, the Court finds that Plaintiffs have failed to assert a plausible claim that no rational relationship exists between the challenged laws and a legitimate government interest.

Therefore, for the above-stated reasons, the Court dismisses Plaintiffs' substantive due process and equal protection facial challenge claims.

6. Vested-rights claim

Since the Court has dismissed all of Plaintiffs' federal claims, it declines to exercise supplemental jurisdiction over their state-law vested-rights

claim and dismisses this claim without prejudice pursuant to 28 U.S.C. § 1367(c)(3).

IV. CONCLUSION

After carefully reviewing the entire file in this matter, the parties' submissions and the applicable law, and for the reasons stated herein, the Court hereby

ORDERS that Defendant Village's motion to dismiss is **GRANTED**; and the Court further

ORDERS that the Town Defendants' motion to dismiss is **GRANTED**; and the Court further

ORDERS that Plaintiffs' federal claims are **DISMISSED WITH PREJUDICE**; and the Court further

ORDERS that Plaintiff's state-law claim is **DISMISSED WITHOUT PREJUDICE** pursuant to 28 U.S.C. § 1367(c)(3); and the Court further

ORDERS that the Clerk of the Court shall enter judgment in favor of Defendants and close this case.

IT IS SO ORDERED.

Dated: September 30, 2009
Syracuse, New York

/s/ Frederick J. Scullin, Jr.
Frederick J. Scullin, Jr.
Senior United States District Court Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Case Number: 5:06 CV 927 (FJS/GHL)

LAWRENCE RUSTON and JANET RUSTON

vs.

THE TOWN BOARD FOR THE TOWN OF SKANEATELES; PAUL "BILL" PAVLUS; THADDEUS ASTEMBORSKI; BARBARA SPAIN; DAVID G. LAXTON; THEODORE MURDICK; THE PLANNING BOARD FOR THE TOWN OF SKANEATELES; MARK TUCKER; JOSEPH SOUTHERN; KENNETH JONES; ALAN BRIGGS; LEWIS WELLINGTON; DESSA BERGEN; ROBERT LOTKOWICTZ; and THE VILLAGE OF SKANEATELES

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That Village Defendants' motion to dismiss is GRANTED; and the Court further Orders, that the Town Defendants' motion to dismiss is GRANTED; and the Court further Orders that Plaintiffs' feder-

al claims are DISMISSED WITH PREJUDICE; and the Court further Orders that Plaintiff's state-law claim is DISMISSED WITHOUT PREJUDICE pursuant to 28 U.S.C. § 1367(c)(3). Judgment is hereby entered in favor of the defendants.

All of the above pursuant to the order of the Honorable Judge Frederick J. Scullin, dated the 30th day of September, 2009.

DATED: September 30, 2009

/s/ [ILLEGIBLE SIGNATURE]
Clerk of the Court

s/
Joanne Bleskoski
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

5:06-CV-927 (FJS/GHL)

LAWRENCE RUSTON and JANET RUSTON,

Plaintiffs,

v.

THE TOWN BOARD FOR THE TOWN OF SKANEATELES; PAUL "BILL" PAVLUS; THADDEUS ASTEMBORSKI; BARBARA SPAIN; DAVID G. LAXTON; THEODORE MURDICK; THE PLANNING BOARD FOR THE TOWN OF SKANEATELES; MARK TUCKER; JOSEPH SOUTHERN; KENNETH JONES; ALAN BRIGGS; LEWIS WELLINGTON; DESSA BERGEN; ROBERT LOTKOWICTZ; and THE VILLAGE OF SKANEATELES,

Defendants.

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[OF COUNSEL] [*cont.*]
FRANK W. MILLER, ESQ.

SCULLIN, Senior Judge

MEMORANDUM DECISION & ORDER

I. INTRODUCTION

Plaintiffs asserted three causes of action against Defendant Village of Skaneateles ("Village"): (1) conspiracy to violate civil rights, under 42 U.S.C. §§ 1983, 1985(3); (2) violation of substantive due process rights, under the Fourteenth Amendment; and (3) violation of equal protection of law, under the Fourteenth Amendment.[2] Currently before the Court is Defendant Village's motion to dismiss these claims pursuant to Rule 12(b)(6) on

[1] Attorney Miller entered an appearance on behalf of all Defendants; however, he appears to represent all Defendants except the Village of Skaneateles (the "Town Defendants").

[2] Plaintiffs also asserted a "Void for Vagueness" claim regarding provisions of the Town Code and a claim for "Vested Rights," claiming entitlement to have their application decided under the prior Town Code. Neither of these claims impact Defendant Village.

the grounds that the statute of limitations has run; that they fail to state a claim; and that there is a failure to show causation.[3]

II. BACKGROUND

Plaintiffs Lawrence Ruston and Janice Ruston own twenty-seven acres of property in the Town of Skaneateles ("Town"), but outside Defendant Village. Starting first from 1990-1991 and again from 2000 until the filing of this suit, Plaintiffs have endeavored to subdivide and develop their property.

Plaintiffs' first cause of action for conspiracy alleges that Defendants have conspired to violate Plaintiffs' civil rights by, among other things, (1) having Plaintiffs' attorney become Defendant Village's attorney; (2) ignoring Plaintiffs' contractual rights and other rights to continued connection to Defendant Village's sewer system; (3) using litigation to delay Plaintiffs' development proposals; (4) selectively applying policy to Plaintiffs' proposals; (5) using Plaintiffs' sewer connection to take their property, i.e., having the Town Defendants require Plaintiffs to connect to Defendant Village's sewage system and having Defendant Village deny them access to the sewage system to the

[3] The Town Defendants submitted an affidavit and memorandum of law in support of Defendant Village's motion and requested dismissal on the same basis as Defendant Village. Additionally, Plaintiffs, without a formal cross-motion, requested the opportunity to move to amend their complaint should the Court dismiss a cause of action.

end of preventing Plaintiffs from subdividing and developing their property.

Plaintiffs' second cause of action for violation of constitutional rights is a substantive due process claim.[4] Plaintiff alleges that Defendant Village arbitrarily and irrationally deprived them of a property interest in sewage service from Defendant Village's sewage system. Finally, Plaintiffs' third cause of action for equal protection violations alleges that Defendant Village applied a "no new connections policy" with respect to its sewage system differently to similarly situated property owners in the Town.

III. DISCUSSION

A. Motion to dismiss standard

On a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the court "must accept all well-pleaded facts as true and consider those facts in the light most favorable to the plaintiff." *Patane v. Clark*,

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[4] The Complaint is not clear regarding which of Plaintiffs' constitutional rights Defendants allegedly violated. Accordingly, Defendant Village moved to dismiss several potential Fourteenth Amendment violations arguably presented under the vague "Constitutional Violations" claim. In their memorandum of law, Plaintiffs clarify that they "have only alleged substantive due process violations under 42 U.S.C. § 1983." *See* Plaintiffs' Memorandum of Law at 14. Based upon this statement, the Court finds that Plaintiffs have abandoned any other constitutional violations, with the exception of the equal protection claim asserted as a separate cause of action and separately discussed in Plaintiffs' memorandum.

508 F.3d 106, 111 (2d Cir. 2007) (per curiam) (citation omitted). The court "must limit itself to the facts stated in the complaint, documents attached to the complaint as exhibits and documents incorporated by reference in the complaint." *Hayden v. County of Nassau*, 180 F.3d 42, 54 (2d Cir. 1999) (citation omitted). If the court looks at additional materials, it should convert the motion into a motion for summary judgment. *See* Fed. R. Civ. P. 12(d).[5]

"[A] complaint must plead 'enough facts to state a claim for relief that is plausible on its face.'" *Patane*, 508 F.3d at 111-12 (quoting *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007)). The Second Circuit interprets *Twombly* to require "a flexible 'plausibility stan-

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[5] In their opposition papers, Plaintiffs submit a supporting affidavit from Plaintiff Lawrence Ruston and other exhibits. Plaintiffs rely on *Bennett v. Cardinal Health Marmac Distribs., Inc.*, No. 02 CV 3095, 2003 WL 21738604, *2 (E.D.N.Y. July 14, 2003), for the proposition that this Court may consider Plaintiffs' supporting affidavit and exhibits in deciding this motion. Plaintiffs' reliance on *Bennett* is misguided and contrary to the rules. In *Bennett*, Judge Gleeson acknowledged that he was going against the general rule, noted that he was considering the affidavits on the invitation of both parties, and also noted that the affidavits allowed him to clearly find that granting leave to amend would be futile. *See id. Bennett* does not apply here. Defendant Village does not invite the Court to consider Plaintiffs' affidavit. Accordingly, in deciding Defendant Village's motion to dismiss, the Court will exclude the exhibits and affidavits that Plaintiffs submitted from its consideration of Defendant Village's motion and declines to convert Defendant Village's motion into a motion for summary judgment.

dard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*" rather than a heightened fact-pleading requirement. *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007). A court should dismiss a complaint that consists of "'conclusory allegations unsupported by factual assertions . . . .'" *Americorp Fin., Inc. v. St. Joseph's Hosp. Health Ctr.*, 180 F. Supp. 2d 387, 390 (N.D.N.Y. 2001) (quoting *De Jesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 70 (2d Cir. 1996)).[6]

B. Statute of Limitations as a basis for dismissal

Defendant Village asserts that the statute of limitations bars some of Plaintiff's claims. The statute of limitations for Plaintiffs' causes of action under 42 U.S.C. §§ 1983, 1985 in New York is three years. *See Paige v. Police Dep't of City of Schenectady*, 264 F.3d 197, 199 n.2 (2d Cir. 2001) (citations omitted).[7] "'While state law supplies the statute of

[6] Plaintiffs' complaint is fifty-eight pages long and contains 312 paragraphs. The Court notes that the complaint is contrary to the spirit of Rule 8 of the Federal Rules of Civil Procedure's direction that a pleading stating a claim for relief contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a).

[7] Plaintiffs' complaint also cites 42 U.S.C. § 1986, *see* Complaint ¶ 7, which has a statute of limitations of one year *See* 42 U.S.C. § 1986; *Paige*, 264 F.3d 199 n.2. However, the claims for relief in the complaint do not mention § 1986; and therefore, despite Plaintiffs' earlier reference to § 1986, Plaintiffs have not alleged such a cause of action and this Court need not consider whether it is time-barred.

limitations for claims under § 1983, federal law determines when a federal claim accrues. The claim accrues when the plaintiff knows or has reason to know of the harm.'" *Connolly v. McCall*, 254 F.3d 36, 41 (2d Cir. 2001) (quoting *Eagleston v. Guido*, 41 F.3d 865, 871 (2d Cir.1994)).

Plaintiffs, who filed their complaint on August 1, 2006, have alleged that Defendant Village denied them sewage access in November of 2004,[8] well within the statute of limitations' time frame. Plaintiffs allege that this decision violated their substantive due process rights and their equal protection rights. Additionally, Plaintiffs allege that the conspiracy between the Town Defendants and Defendant Village resulted in the November 2004 denial as well as the other deprivations that the Town Defendants caused. Therefore, the Court finds that, based on the allegations in the complaint, the statute of limitations does not prevent Plaintiff from asserting any of its claims against Defendant Village.[9] Accordingly, the Court denies Defendant Village's motion to dismiss these causes of action pursuant to Rule 12(b)(6) on this ground.

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[8] The complaint alleges that Defendant Village made its decision on November 8, 2004, and sent the letter notifying Plaintiffs of this decision on November 9, 2004. *See* Complaint ¶¶ 182-183.

[9] Defendant Village also makes a proximate cause argument, citing the availability of alternative sewage disposal methods. *See* Defendant Village's Memorandum of Law at 24. Plaintiffs have sufficiently pled that Defendant Village's actions, as well as those of the Town Defendants, caused their damages. *See, e.g.*, Complaint ¶¶ 303-06.

C. Failure to state a claim as a basis for dismissal

1. Plaintiffs' § 1985(3) conspiracy claim

To state a claim for a violation of § 1985(3), "the plaintiff must allege and prove four elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States." *United Bhd. of Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 828-29 (1983). "[A] conspiracy is actionable under § 1985 only if it involves a discriminatory animus based on race or some other invidious classification." *Posr v. Court Officer Shield No. 207*, 180 F.3d 409, 419 (2d Cir. 1999) (citing *United Bhd. of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 829, 834-35, 103 S. Ct. 3352, 77 L. Ed. 2d 1049 (1983)). In *Scott*, the Supreme Court held that economic and commercial conflicts are beyond the reach of § 1985(3). *See Scott*, 463 U.S. at 839.

Plaintiffs have not alleged racial or other invidious class-based discrimination as the basis for their § 1985 conspiracy claim. To the contrary, Plaintiffs base their allegations of animus on Plaintiffs' failure to associate with influential figures (not based on any classification) and the desire of surrounding property owners to avoid diminishment of property values. *See* Plaintiffs' Memorandum of

Law at 3. Neither of these reasons constitutes invidious class discrimination. Furthermore, the property-value basis for these claims is an economic conflict, which cannot support a § 1985 action under *Scott*. Accordingly, Plaintiffs have failed to state a § 1985(3) claim for conspiracy; and, therefore, the Court grants Defendant Village's motion to dismiss this claim.

2. Plaintiffs' substantive due process claim under the Fourteenth Amendment

"[A] party asserting deprivation of substantive due process must first establish a valid property interest within the meaning of the Constitution . . . . [and] must demonstrate that the defendant acted in an arbitrary or irrational manner in depriving him of that property interest." *Crowley v. Courville*, 76 F.3d 47, 52 (2d Cir. 1996) (citations omitted); *see also Clubside, Inc. v. Valentin*, 468 F.3d 144, 152 (2d Cir. 2006).

a. Property interest

To establish a property interest, a plaintiff must show a "'"legitimate claim of entitlement."'" *Crowley*, 76 F.3d at 52 (quotations omitted). "'The [strict entitlement] analysis focuses on the extent to which the deciding authority may exercise *discretion* in arriving at a decision, rather than on an estimate of the probability that the authority will make a specific decision.'" *Id.* (quoting *Zahra [v. Town of Southold*,] 48 F.3d [674,] 680 [(2d Cir. 1995)]). If the governmental entity possesses discretion, the plaintiff does not have a legitimate

entitlement and, therefore, lacks a property interest. *See id.*

In New York, a village board of trustees has broad discretion to deny water and sewer connections to outside users. *See Kontokosta v. Village of Greenport*, No. 87 Civ. 3432, 1991 WL 206296, *4 (S.D.N.Y. Sept. 27, 1991) (citing N.Y. Village Law § 11-1120 (McKinney 1991); N.Y. Village Law § 14-1404 (McKinney 1991);[10] 19 Op. St. Comptr. 232 (1963)).[11] The Court in *Kontokosta* found that, under New York law, the Board of Trustees was authorized to decide the applications for water and sewage access and "had full discretion" to deny the applications, noting the village's severe water and sewage shortages. *See id.* The Second Circuit found no property interest in the granting of an application for sewage access where the town board had

[10] The cited statutes authorize a board of commissions to sell water and sewage outside the corporate limits; both contain the language "may sell." *See* N.Y. Village Law §§ 11-1120; 14-1404.

[11] "A village has a continuing obligation to furnish water to outside consumers currently using water based on the contractual nature of the outside connections to the village system. This contract, however, is contingent on the continuing existence of a water surplus. *Prospective outside users have no contractual rights to such use and water service may be denied them.*" *Kontokosta*, 1991 WL 206296, at *4 (quoting 19 Op. St. Comptr. 232). Although Plaintiffs alleged that Defendant Village threatened to terminate the existing sewage access, Defendant Village has not done so and has only declined to grant access to expanded and new buildings. Therefore, the Court need not address whether Plaintiffs have a property interest in continued water and sewage service.

broad discretion to grant or deny such petitions based on the public interest. *See Clubside*, 468 F.3d at 157.

Here, Plaintiffs allege in their complaint that Defendant Village's discretion is limited and therefore they have a property right.[12] Plaintiffs assert two grounds for limiting Defendant Village's discretion such that a property right exists in their obtaining sewage rights: a contract entered into between Defendant Village, the City of Syracuse, the Country Club, and Dwight Winkelman (prior owner of Plaintiffs' property) and the parties' subsequently developed understanding that Plaintiffs' property was "grandfathered" into the sewer system and was entitled to additional service despite the no-new-connections policy.[13]

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[12] Plaintiffs also assert a right to develop their property in accordance with applicable zoning laws. The Town, and not Defendant Village, applied the zoning laws and therefore Plaintiffs do not have a substantive due process claim against Defendant Village on this basis. Since Plaintiffs' conspiracy claim fails, Defendant Village is not responsible for the actions of the Town. Therefore, at this time, the Court need not address whether Plaintiffs have a property interest to develop under the applicable zoning laws.

[13] Plaintiffs also assert a property right on the basis that they were subject to an *ad valorem* tax to construct and maintain Defendant Village's sewer system. Plaintiffs' complaint does not contain allegations of such a tax, and Plaintiffs only refer to an exhibit to their memorandum of law. Plaintiffs may not rescue deficiencies in their complaint with the materials submitted in opposition to a motion to dismiss. *See Branch v. Tower Air, Inc.*, No. 94 Civ. 6625, 1995 WL 649935, *6 (S.D.N.Y. Nov. 3, 1995) ("[M]emoranda and supporting affidavits in opposition to a motion to dismiss cannot be used to

Plaintiffs assert that property interests are created and defined by contracts and understandings between parties. Plaintiffs allege in their complaint that, at the time they purchased the property, the boathouse, main house, and gate house were serviced by sewage lines to Defendant Village's sewer system and that the carriage house was connected to Defendant Village's sewer system in 1986 pursuant to written authority from the Mayor. Accordingly, Plaintiffs contend that their property was grandfathered into the system such that new sewage connections were proper. *See* Complaint ¶¶ 43,79, 104. Plaintiffs further claim that Defendant Village's discretion is limited to situations where there is no longer any excess capacity. *See* Plaintiffs' Memorandum of Law at 16.

Even accepting that Plaintiffs can establish a contract for the provision of water and sewage to their property and an understanding that their property is entitled to new connections, as alleged, the Court finds that, as a matter of law, Plaintiffs do not have a constitutionally protected property interest in the added connections.

A proper application for outside sewage rights, under New York's Village Law, is never assured approval because a village must always consider whether the use will render the system inadequate for the village and its inhabitants. *See* N.Y. Village Law § 14-1404. Even if the rights were already sold

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cure a defective complaint . . . ." (citations omitted)). Accordingly, the Court concludes that Plaintiffs failed to allege a property interest based on an *ad valorem* tax in the complaint.

under the contract, a village has discretion to end the use, where it believes the use will render the system inadequate. By law, a village cannot contract away this obligation through a contract or understanding. The right to discontinue water supply "must be a rather broad one." *Kennilworth Mgt. Co. v. City of Ithaca*, 63 Misc. 2d 617, 620 (N.Y. Sup. Ct. Tompkins County 1970).

Regardless of whether the system had excess capacity, and the Court will assume, as alleged, that it did for the purposes of this motion, Defendant Village still had the discretion to deny additional use that would render the system inadequate. The evaluation of the adequacy of the system is similar to the evaluation at issue in *Clubside* regarding the public interest. *See Clubside*, 468 F.3d at 157 ("Thus, while a town board does not have limitless discretion to decide whether an extension of a sewer district is in the public interest, the cases Clubside relies upon do not explicitly define the scope of a board's discretion or limit the appropriate considerations sufficiently to make the Board's discretion 'so narrowly circumscribed that approval of a proper application is virtually assured.'" (quotation omitted)). Moreover, the Court concludes that there is no objective definition of "adequate for the inhabitants" that would relieve Defendant Village of all discretion, sufficient to generate a federally-protected property right.

The Court notes that a village may consider any number of factors beyond the current quantifiable measures of the sewage system to determine whether to permit additional connections outside

the village. Specifically, a village might consider, among other things, future growth within the village, deterioration of the system and its capacity, or whether the village plans to modify the system in a way that will reduce capacity but better serve the village. *See Kennilworth*, 63 Misc. 2d at 622 ("[I]t does not seem to the court to be unreasonable or arbitrary for the city to look to the future of its water supply before committing itself to an extension of service which may later cause trouble for itself and those residents of outlying areas presently dependent on the city source. In this respect the city has broad discretionary powers to act for the protection of its inhabitants." (citations omitted)).[14]

b. Arbitrary or irrational government action

In addition to demonstrating a protected property interest, plaintiffs must also show that governmental action deprived them of a property interest in an arbitrary or irrational manner. *See Crowley*,

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[14] Furthermore, the Court notes that, to the extent Plaintiffs' claim is based on a property interest generated by the contract or the "grandfathered" understanding, even if such a property interest is cognizable under the law, Plaintiffs' claim, if based solely on this property interest, is likely barred by the statute of limitations. As discussed above, the statute of limitations for § 1983 actions is three years. Defendant Village decided that it would not honor any alleged contract or understanding in "mid-1991." *See* Complaint ¶ 57. In 1991, Plaintiffs were aware that Defendant Village refused to grant new sewage connections despite the "grandfathered" understanding and the contract. Accordingly, Plaintiffs' claim for the deprivation of these property interests accrued prior to August 1, 2003.

76 F.3d at 52. Substantive due process is an outer limit on governmental action; therefore, it does not forbid arbitrary and capricious conduct correctable in a state-court review of an administrative action, rather "[s]ubstantive due process standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority." *Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999) (citations omitted). "'Only a substantial infringement of state law prompted by personal or group animus, or a deliberate flouting of the law that trammels significant personal or property rights, qualifies for relief under § 1983.'" *Id.* (quoting *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir. 1988)).

The conduct must be "'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'" *Bullock v. Gerould*, 338 F. Supp. 2d 446, 451 (W.D.N.Y. 2004) (quoting [*County of Sacramento v.*] *Lewis*, 523 U.S. [833,] 848 n.8, 118 S. Ct. 1708 [(1998)])) (citing *Tenenbaum v. Williams*, 193 F.3d 581, 600 (2d Cir. 1999)). The *Bullock* court found that the allegations in the complaint established wrongful conduct for improper motives but not a substantive due process claim. *See id.* "'The protections of substantive due process are available only against egregious conduct which goes beyond merely "offend[ing] some fastidious squeamishness or private sentimentalism" and can fairly be viewed as so "brutal" and "offensive to human dignity" as to shock the conscience.'" *Id.* (quoting *Smith ex rel.*

Smith v. Half Hollow Hills Cent. School Dist., 298 F.3d 168, 173 (2d Cir. 2002) (internal quotations omitted)).

The Third Circuit recently considered the types of gross misconduct that shock the judicial conscience in the context of land use and related approvals. *See Eichenlaub v. Township of Indiana*, 385 F.3d 274, 285 (3d Cir. 2004) (finding that the alleged selective enforcement of zoning provisions, unannounced and unnecessary inspection and enforcement actions, delay of permits and approvals, increases of tax assessments, and maligning and muzzling of the plaintiffs, are examples of disagreements that frequently arise in planning disputes and such conduct does not shock the judicial conscience; and, noting the lack of self-dealing, corruption, interference with an otherwise constitutionally protected activity, bias against an ethnic group, or forced seizure and sale, i.e., virtual "taking," any of which might shock the judicial conscience) (citations omitted).[15]

The Third Circuit's analysis and examples are helpful, and Plaintiffs' alleged conduct falls into the same non-conscience-shocking categories as the alle-

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[15] Plaintiffs' cases are distinguishable. Plaintiff cites, e.g., *Brady v. Town of Colchester*, 863 F.2d 205, 215-16 (2d Cir. 1988), for the proposition that denial of a land use permit for impermissible political animus violates due process. However, *Brady* (and the remainder of Plaintiffs' cases, *see* Plaintiffs' Memorandum of Law at 19), was decided before *Lewis* and under a different legal standard than the "shocks the conscience" test. *See Eigenlaub*, 385 F.3d at 285 n.8.

gations in *Eichenlaub* or those in *Natale*.[16] Plaintiffs' allegations about Defendant Village's governmental actions consist mostly of delaying tactics, denial of sewage connections, and selective enforcement of a no-new connections policy. Although Plaintiffs may have alleged wrongful conduct that could potentially violate New York law, Plaintiffs' allegations of improper motives for denying the sewage application are not sufficient to state a substantive due process claim. Accordingly, for this reason as well, the Court finds that the complaint fails to state a substantive due process claim by failing, as a matter of law, to allege conduct that shocks the conscience.[17, 18]

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[16] *See also PFZ Props., Inc. v. Rodriguez*, 928 F.2d 28, 32 (1st Cir. 1991) (finding delay tactics and refusals to issue permits in violation of Puerto Rico law fail to state a substantive due process claim).

[17] Defendant Village also argues that the Court should not consider Plaintiffs' substantive due process claim because the equal protection clause of the Fourteenth Amendment provides an explicit textual source of constitutional protection. *See Velez v. Levy*, 401 F.3d 75, 94 (2d Cir. 2005) (finding Plaintiffs' actions, but for the allegations of First Amendment and Equal Protection Clause violations, would not be sufficient to assert substantive due process claims). The Court need not reach this issue because it is dismissing the substantive due process claim for failure to state a claim. The Court notes that Plaintiffs could arguably state a substantive due process violation based on Defendants' actions even if they are unable to show disparate conduct for similarly-situated individuals, and that, therefore, the equal protection claim against Defendant Village does not subsume the substantive due process claim against Defendant Village.

[18] Defendant Village also asserts that the substantive due process claim must fail because Plaintiffs could have used an

3. Plaintiffs' equal protection claim

To state a claim for an equal protection violation, Plaintiffs must show that Defendant Village singled them out intentionally for arbitrary treatment without a rational basis. *See Clubside*, 468 F.3d at 158-59.[19] Plaintiffs may state a claim as a "class-of-one" by alleging "that they were intentionally treated differently from other similarly-situated individuals without any rational basis." *Id.* at 159 (citing [*Village of Willowbrook v. Olech*, 528 U.S. 562,] 564, 120 S. Ct. 1073 [(2000)]; *accord Bizzarro v. Miranda*, 394 F.3d 82, 88 (2d Cir. 2005)). In the Second Circuit, "plaintiffs must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves." *Id.*

> Accordingly, to succeed on a class-of-one claim, a plaintiff must establish that "(i) no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy; and (ii) the similarity in circumstances and difference in treatment

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Article 78 state-court proceeding to challenge Defendant Village's action. However, post-deprivation state-law remedies only apply to bar procedural due process claims. *See Zinermon v. Burch*, 494 U.S. 113, 125 (1990).

[19] Since Plaintiffs have not alleged that they are a member of any particular class, the Court will address their equal protection claim as a "class-of-one" claim.

> are sufficient to exclude the possibility that the defendants acted on the basis of a mistake."

Id. (quotation omitted).

Plaintiffs' sole allegation regarding similarly-situated persons and difference in treatment is in paragraph 109 of the complaint. *See* Complaint ¶ 109 ("[T]he VILLAGE selectively enforced this stated policy after it was adopted by accepting requests for sanitary sewer service outside the VILLAGE's corporate limits, granting other such applications.").[20] This single allegation is insufficient to state a claim that Defendant Village treated others, with a high degree of similarity to Plaintiffs, differently. Accordingly, the Court dismisses Plaintiffs' equal protection claim against Defendant Village for failure to state a claim without prejudice.

D. The Town Defendants' request for dismissal

The Town Defendants, without filing a motion, joined Defendant Village's motion to dismiss. The Court will dismiss Plaintiffs' conspiracy claim against the Town Defendants for the reasons stated above and because Plaintiffs failed to allege race or other invidious class-based discrimination.

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[20] In paragraph 141, the complaint hints that Defendant Village granted more requests for sewer service but does not discuss the similarity of the situations or any disparate treatment. *See* Complaint ¶ 141.

The Court declines to consider whether to dismiss the substantive due process and equal protection claims against the Town Defendants as the property interests and government conduct are different for the Town Defendants compared with Defendant Village. Furthermore, Plaintiffs have not had an opportunity to brief those issues. Similarly, the void for vagueness and vested rights claims do not apply to Defendant Village, and Plaintiffs did not address them. If the Town Defendants want the Court to consider dismissing those claims, they must file an appropriate motion in compliance with the Local Rules.

E. Plaintiffs' request for leave to amend

Plaintiffs, without filing a motion, have asked for leave to amend should the Court dismiss any claims. *See* Plaintiffs' Memorandum of Law at 23. A court should freely grant leave to amend a pleading when justice so requires. *See* Fed. R. Civ. P. 15(a)(2). A court should obey Rule 15's direction "absent evidence of undue delay, bad faith or dilatory motive on the part of the movant, undue prejudice to the opposing party, or futility . . . ." *Monahan v. N.Y. City Dep't of Corr.*, 214 F.3d 275, 283 (2d Cir. 2000) (citing *Foman* [*v. Davis,*] 371 U.S. [178,] 182, 83 S. Ct. 227 [(1962)]).

Since Plaintiffs did not submit a proposed amended complaint, the Court has considered Plaintiffs' supplemental affidavit as demonstrative of the additional allegations that they would include in their amended complaint. Based upon its

review of their affidavit, the Court finds that it would be futile to permit Plaintiffs to amend their substantive due process claim against Defendant Village. Even if Plaintiffs were able to allege sufficiently a protected property interest, Plaintiffs' amended substantive due process claim would still fail to state a claim because Plaintiffs cannot show the necessary conscience shocking governmental action. Likewise, the Court concludes that it would be futile to allow Plaintiffs to amend their conspiracy claim because Plaintiffs are unable to allege an invidious class-based conspiracy to discriminate.

On the other hand, the Court will allow Plaintiffs to amend their complaint with regard to their equal protection claim against Defendant Village because Plaintiffs may be able to plead sufficiently that Defendant Village treated similarly-situated individuals differently. The Court will also allow Plaintiffs to amend their complaint with respect to all their claims against the Town Defendants except their conspiracy claim.[21]

IV. CONCLUSION

After carefully considering the entire file in this matter, the parties' submissions and the applicable law, and for the reasons stated herein, the Court hereby

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[21] The Court denies Plaintiffs leave to amend their complaint to assert a conspiracy claim against the Town Defendants because, as noted above, Plaintiffs cannot allege an invidious class-based conspiracy to discriminate.

ORDERS that Defendant Village's motion to dismiss is **GRANTED**; and the Court further

ORDERS that the Town Defendants' request for dismissal is **GRANTED IN PART** and **DENIED IN PART**; and the Court further

ORDERS that Plaintiffs' conspiracy claims pursuant to § 1985(3) against all Defendants are **DISMISSED** with prejudice; and the Court further

ORDERS that Plaintiffs' substantive due process claim against Defendant Village is **DISMISSED** with prejudice; and the Court further

ORDERS that Plaintiffs' equal protection claim against Defendant Village is **DISMISSED** without prejudice; and the Court further

ORDERS that Plaintiffs' request for leave to amend is **GRANTED IN PART** and **DENIED IN PART**; and the Court further

ORDERS that Plaintiffs may amend their complaint to assert an equal protection claim against Defendant Village and all their claims against the Town Defendants except their conspiracy claim;[22] and the Court further

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[22] The Court Advises Plaintiffs That Any Amended Complaint That They File Must Comply With The Dictates Of Rule 8 Of The Federal Rules Of Civil Procedure. Failure To Comply With This Rule, Or Any Other Federal Rule Of Civil Procedure Or Local Rule, Could Subject Plaintiffs To The Imposition Of Sanctions.

ORDERS that Plaintiffs shall file their amended complaint within twenty (20) days of the date of this Order; and the Court further

ORDERS that this matter is referred to Magistrate Judge Lowe for all further pretrial matters.

IT IS SO ORDERED.

Dated: December 22, 2008
Syracuse, New York

/s/ Frederick J. Scullin, Jr.
Frederick J. Scullin, Jr.
Senior United States District Court Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

06 Civ. 927 (FJS/GHL)
JURY TRIAL DEMANDED

LAWRENCE RUSTON and JANET RUSTON,

Plaintiffs,

– against –

THE TOWN BOARD FOR THE TOWN OF SKANEATELES, PAUL "BILL" PAVLUS, THADDEUS ASTEMBORSKI, BARBARA SPAIN, DAVID G. LAXTON, THEODORE MURDICK, THE PLANNING BOARD FOR THE TOWN OF SKANEATELES, MARK TUCKER, JOSEPH SOUTHERN, KENNETH JONES, ALAN BRIGGS, LEWIS WELLINGTON, DESSA BERGEN, ROBERT LOTKOWICTZ, and THE VILLAGE OF SKANEATELES,

Defendants.

AMENDED COMPLAINT

Plaintiffs LAWRENCE RUSTON and JANET RUSTON (the "Plaintiffs"), by their attorneys, FEERICK LYNCH MACCARTNEY, PLLC, as and for their Complaint amended pursuant to the Memorandum Decision Order of this Court dated December 22, 2008 against the above-captioned Defendants (collectively, the "Defendants") alleges upon information and belief as follows:

SUMMARY AND NATURE OF ACTION

1. This action is brought by the Owners of real property in the Town of Skaneateles, in Onondaga County, New York, to obtain redress for wrongs from past and ongoing Civil Rights Violations involving the taking of property rights, by Defendants. Defendants singled Plaintiffs out, thrust Plaintiffs into a customized revolving door, and thus rendered Plaintiffs unable to develop their 27 acre lake front property under any condition or through any compromise.

2. Since efforts to develop their real property in Skaneateles began in 1990, the Plaintiffs have been repeatedly subjected to unequal as well as outrageously arbitrary and capricious conduct by officials of the Town of Skaneateles (the "TOWN"), and Defendant, Village of Skaneateles (the "VILLAGE") who have abused their authority and allowed special interests and petty prejudices to govern municipal affairs.

3. These Civil Rights violations have continued to have the purpose and effect of directly depriving the Plaintiffs of their constitutional and statutory rights.

4. Defendants are the Town Board and The Town Planning Board of The Town of Skaneateles, and their respective individual members, as well as the Village of Skaneateles, New York who acted individually and in concert, to violate Plaintiffs' civil rights under 42 U.S.C. §§ 1983 by, among other things: (1) delaying action on Plaintiffs' various

applications to develop their property, (2) refusing to act on many aspects of Plaintiffs' various applications, (3) placing irrational and arbitrary obstacles in the way of Plaintiffs' lawful attempts to exercise their property development rights, (4) in enacting carefully tailored illegal and unconstitutionally vague changes to the TOWN Comprehensive Plan, Zoning Code, and Subdivision Regulations designed specifically to thwart and prevent development of their property, all in violation of Plaintiffs' civil rights, and (5) treating the Plaintiffs unequally from others similarly situated for improper purposes.

5. Defendants' conduct is and should be declared unlawful, and should be permanently enjoined and remedied by an appropriate award of monetary damages, and Defendants and all those acting in concert with them should be enjoined from performing any and all acts in furtherance of depriving Plaintiffs of their constitutional rights under the law.

JURISDICTION AND VENUE

6. Jurisdiction of this Court is based upon 28 U.S.C. § 1331 and § 1343(a).

7. This action is brought pursuant to the Fourteenth Amendment to the United States Constitution; the Civil Rights Act, 42 U.S.C. §§ 1981, 1982, 1983, and 1988;

8. Declaratory relief is authorized pursuant to 28 U.S.C. §§ 2201 and 2202.

9. Venue is proper under 28 U.S.C. § 1391(b) in that the Defendants reside and the claims alleged herein arise in this Judicial District.

PARTIES

10. Plaintiffs LAWRENCE RUSTON and JANET RUSTON are owners and residents of real property located at 3384 West Lake Street in the Town of Skaneateles, in Onondaga County, New York (the "PREMISES").

11. Defendant, TOWN BOARD OF SKANEATELES (the "TOWN BOARD"), is a Municipal Corporation organized under the laws of the State of New York having jurisdiction over all matters within the territorial boundaries of the TOWN, including the enactment of zoning and planning laws.

12. Defendant, SKANEATELES PLANNING BOARD (the "PLANNING BOARD"), is a duly delegated entity within the TOWN responsible for the review and approval of site plans.

13. Defendant, PAUL "BILL" PAVLUS was at all relevant times herein the TOWN Supervisor and Chairman of the TOWN BOARD and resides in the TOWN.

14. Defendants, THADDEUS ASTEMBORSKI, BARBARA SPAIN, DAVID G. LAXTON and THEODORE MURDICK were at all times relevant Members of the TOWN BOARD and reside in the TOWN.

15. Defendant, MARK TUCKER, was at all relevant times herein the Chairman of the PLANNING BOARD and resides in the TOWN.

16. Defendants, JOSEPH SOUTHERN, KENNETH JONES, ALAN BRIGGS, LEWIS WELLINGTON, DESSA BERGEN and ROBERTY LOTKOWICTZ, were at all relevant times Members of the PLANNING BOARD and resided in the TOWN.

17. Defendant, VILLAGE OF SKANEATELES (the "VILLAGE"), is a Municipal Corporation organized under the laws of the State of New York having jurisdiction over all matters within the territorial boundaries of the VILLAGE including the provision of sanitary sewer services to TOWN and VILLAGE residents.

INITIAL EFFORTS BY PLAINTIFFS TO DEVELOP THEIR PROPERTY IN THE 1990'S

18. Plaintiffs purchased the 27 acre Premises in or about 1978 with investment backed expectations to use and subsequently develop the premises.

19. At purchase, the Premises contained a structure on the shoreline of Skaneateles Lake (hereinafter referred to as the "Boathouse"), a Carriage House, a Gate House, and, until December 2004, also contained a Main House.

20. At the time Plaintiffs moved into the Premises with their children in 1978, the Boathouse, Gate House, and Main House were all already hooked into and serviced by two VILLAGE sewer system lines pursuant to prior contract and agreement with the VILLAGE.

21. In 1986, pursuant to written authority from the VILLAGE Mayor, the Carriage House was also connected to the VILLAGE sewer system.

22. At the time Plaintiffs moved into the Premises in 1978, Plaintiffs primarily utilized the Main House as their residence, rented out a number of apartments within the Carriage House and Gate House to various tenants, and used the Boathouse as a guest home.

23. At the time they moved into the Premises, Plaintiffs' investment backed expectation was to move from the Main House upon emancipation of their children, and to renovate and extend the Boathouse so as to utilize it as their primary residence on the Premises, in a manner so as to preserve the character and views of the structure and property from the lake itself, and to appropriately develop the remainder of the Premises to provide for financial security into their retirement years.

24. In 1990 pursuant to investment backed expectations, Plaintiffs submitted a proposal to the PLANNING BOARD to develop the Premises by establishing 10 new residential units (plus two existing units) which together with the Boathouse would constitute 13 lots.

25. The PLANNING BOARD refused to take action on the application in the absence of written assurance that Plaintiffs would be permitted to connect all 10 of the new units to the VILLAGE sewer system, and prior to 1990, the VILLAGE had indeed granted

prior requests from others similarly situated to connect to the VILLAGE sewer system.

26. Thus, in June 1990, Plaintiffs requested the VILLAGE to permit the ten (10) new proposed structures to connect to the VILLAGE sewer system, but the Village refused to take action on the request despite that the system had the biological capacity to handle an additional 800 people or approximately 300 homes.

27. The VILLAGE Planning Board passed a motion on May 2, 1991 "'recommending" to the VILLAGE Board of Trustees that any proposals for connections to the VILLAGE sewer system from outside the VILLAGE should be denied, specifically mentioning by name the Plaintiff Ruston proposal as the reason for its "recommendation."

28. Rather then grant Plaintiffs' request as they had for other similarly situated individuals, after an unreasonable and irrational delay of more than one year, the VILLAGE without any foundation in the record denied Plaintiffs' request.

29. Plaintiffs thereafter undertook numerous unsuccessful efforts to market and sell the property as a whole or with only subdividing it into four lots since the Defendants intentionally, maliciously, arbitrarily and irrationally denied Plaintiffs' rights to VILLAGE sewer service while allowing others similarly situated the same rights being denied to the Plaintiffs.

PLAINTIFFS' PROPOSAL TO DEVELOP FOURTEEN (14) LOTS IN 2000

30. In or about August 2000, Plaintiffs submitted a proposal to the TOWN PLANNING BOARD for approval of a subdivision containing 14 residential lots with each new unit to be separately serviced by an individual mound septic system.

31. The TOWN BOARD, in direct response to Plaintiffs' application and plans to subdivide and develop their property, and for the purpose of thwarting Plaintiffs' development, passed a resolution reauthorizing and reestablishing the Skaneateles Community Planning Advisory Committee to review, study and evaluate the 1996 joint TOWN and VILLAGE Comprehensive Plan and identify and report to the TOWN BOARD any issues or portions of the plan that may need to be amended.

32. The true reason for "reestablishing" this committee was to change the Comprehensive Plan and Zoning Code to thwart Plaintiffs' development plans.

33. Thereafter, Defendants set about to intentionally delay Plaintiffs' applications until the new Comprehensive Plan and Zoning Code could be enacted so as to prevent Plaintiffs' property rights in developing their property pursuant to the existing code from vesting, and hired Plaintiffs' own professionals (including their former lawyer and planner) to assist them in thwarting Plaintiffs' plans.

34. On February 13, 2001, the ZBA conducted a public hearing on the Plaintiffs' application for variances regarding the expansion of the Boathouse, where Defendant DESSA BERGEN spoke out against Plaintiffs' application, even though she was at that time a sitting member of the TOWN PLANNING BOARD and a member of Citizens to Preserve the Character of Skaneateles Lake ("CPCS"), which she did not disclose.

35. After illegal non-public meetings whereat VILLAGE and TOWN officials agreed to thwart Plaintiffs' development plans by, among other things, denying the right to sewer service, the VILLAGE Mayor then singled Plaintiffs out again by not only denying VILLAGE sewer hook-up for new units, but by threatening to take away sewer service even to existing buildings at the premises if "redeveloped."

36. The TOWN thereafter failed or refused to proceed with due consideration of Plaintiffs' ZBA application.

PLAINTIFFS' APPLICATION FOR APPROVAL OF TWELVE (12) RESIDENTIAL LOTS

37. On or about June 27, 2001, Plaintiffs applied to the Onondaga County Health Department ("OCHD") for approval of sanitary facilities for a subdivision for 12 residential lots, including three lakefront lots hooked into the VILLAGE sewer system the remaining nine lots to be serviced by individual septic mound systems.

38. In connection therewith, Plaintiffs duly submitted an application for subdivision, site plan, and special permit approval to the TOWN along with a check for the $2,175 application fee, after which the TOWN required Plaintiffs to pay an additional $6,000.00.

39. On March 28, 2002, the PLANNING BOARD conducted a meeting concerning Plaintiffs' application, at which Douglas Wickman, the PLANNING BOARD Engineer, reported contact from the OCHD inquiring as to why the Plaintiffs' project would not simply be connected to the existing VILLAGE sewer system (as others similarly situated previously had been).

40. The PLANNING BOARD thereafter continued to unreasonably and irrationally delay action on the application.

THE 100 YEAR FLOOD PLAIN ISSUE

41. For example, on May 28, 2002, the PLANNING BOARD conducted another meeting, where TOWN PLANNING BOARD Attorney, Mary Kendrick Gaffney, in furtherance of the overall plan to delay and deny Plaintiffs' development plans, raised an issue of an alleged 100 year flood plain beyond any flood plain documented on any of the accepted FEMA flood plain maps, and stated that this alleged flood plain must be subtracted from the buildable area on the Plaintiffs' premises, unless Plaintiffs withdrew their application, acquired a special permit, filled in the area, then re-applied "after a few years."

42. The PLANNING BOARD then insisted that the area within its arbitrarily imposed alleged "100 year flood plain" be subtracted from the overall acreage on the property to calculate the number of lots which could legally be built on the property under the Zoning Code, resulting in a reduction of the number of lots which could be built from 12 down to 11.

43. Plaintiffs then submitted revised sewage plans proposed to actually decrease the overall sewage flow and allowing a corresponding number of the new units to connect into the VILLAGE sewer system with no net increase in sewage flow to the VILLAGE system.

44. Consistent with Defendants' shared intent to thwart Plaintiffs' use and development of the property, on July 25, 2002, the Plaintiffs' former attorney, Michael J. Byrne, Esq. (now acting on behalf of the VILLAGE) wrote to Plaintiffs' engineer, Barry Pickard, that the VILLAGE will not allow the Plaintiffs to connect to the VILLAGE sewage system nor to even maintain existing connections if existing units are redeveloped, and threatened that "[a]ny effort to add new flows or new connections to the existing system will be vigorously opposed by the VILLAGE using whatever means are necessary," notwithstanding the fact that the Plaintiffs had been paying an ad valorem sewer tax and were connected to the Village system pursuant to prior contractual arrangements, and notwithstanding that the VILLAGE had permitted others similarly situated new connections or new increased flows and had

not similarly threatened any such similar action against others.

45. The VILLAGE sewage plant was not operating at or near its limit as was falsely represented on behalf of the VILLAGE and any "no new connections" or "no increased flow" policies apparently applied and were enforced only against Plaintiffs.

46. On August 1, 2002, Plaintiffs' Engineer, Barry Pickard, advised Mr. Byrne that the proposed additional connections to the VILLAGE sewage system would not increase the sewage flows at all to the VILLAGE system nor fill the plant above capacity, but on August 9, 2002, Mr. Byrne advised that the VILLAGE would still prohibit any new structures connected to the VILLAGE sewer system.

47. The VILLAGE selectively enforced this stated policy against Plaintiffs only, as they accepted requests for sanitary sewer service or new increased flows outside the VILLAGE'S corporate limits for other properties similarly situated to Plaintiffs.

48. Thereafter, as a result of the conduct of Defendants regarding Plaintiffs' plans, the Plaintiffs were forced to again substantially revise their plans at great cost and expense.

DEFENDANTS CLAIM A "PUBLICATION ERROR" IN THEIR ZONING CODE

49. On April 8, 2003, an informal meeting was conducted among Plaintiffs and representatives of

the TOWN, at which time Plaintiffs advised that although it was not their desire or intent at all to do so, their rights under the Code would actually permit 30 or more homes on this site for a conventional subdivision and substantially more with a performance subdivision, which was consistent with what Planner Joel Russell had previously advised Plaintiffs.

50. On or about April 10, 2003, TOWN PLANNING BOARD Attorney, Ms. Gaffney wrote to Plaintiffs admitting that the Code as written permitted such development, but claiming that the Code contained a "mistake" which she called a "publication error."

51. On April 29, 2003, a Special PLANNING BOARD meeting was conducted, at which time Plaintiffs' architect, Mr. Ramsgard submitted four new sketches to replace the original proposal submitted in January, 2002 in order to overcome any and all obstacles placed before Plaintiffs by the Defendants. Defendant, TUCKER directed that the old proposal be withdrawn.

52. Plaintiffs' revised proposal was for a subdivision of 12 lots but only 11 dwelling units, and was endorsed by the neighbors on all sides.

53. Defendants continued to obstruct the Plaintiffs' lawful efforts to move forward with the development of their property by attempting to delay action on Plaintiffs' plans for the purpose of permitting time for changes in the Comprehensive Plan, Zoning Code, and Subdivision Regulations (the "EXISTING PLAN"), and so as to prevent Plain-

tiffs' property development rights under the Existing Plan from vesting.

54. On October 2, 2003, while still continuing its delay of the Plaintiffs' development efforts, the PLANNING BOARD pushed forward with its efforts to change the laws, and issued its recommendations to the proposed Draft Joint Comprehensive Plan, whereby the PLANNING BOARD recommended numerous changes to the draft for the purpose of thwarting the plans submitted by Plaintiffs for the development of their property.

55. For example, the PLANNING BOARD recommended (a) changing the proposed Draft Comprehensive Plan to clarify that capacity in the VILLAGE's sewer system must not be applied to "new development" such as Plaintiffs, (b) removing the Plan's explicit recognition of the need for new common septics and sewer districts in the watershed, (c) amending the Plan to allow the creation of sewer districts only outside the watershed overlay district, while arbitrarily and capriciously prohibiting them inside the watershed, where Plaintiffs' property was located, and (d) removing the Plan's provision which would have allowed creation of TOWN sewer districts to service cluster developments as proposed by Plaintiffs.

56. Plaintiffs again sought action from the TOWN, but the Plaintiffs were advised on October 31, 2003 that the PLANNING BOARD refused any further meetings since it had already "expressed concerns about approving a 12 lot subdivision."

57. On December 2, 2003, the ZBA conducted a meeting, where Mr. Ramsgard, on behalf of Plaintiffs, presented three options for the property, leaving it to the ZBA to decide which it preferred.

58. Notwithstanding that Defendant VILLAGE had already made its position clear that it would not allow Plaintiffs to connect any new dwellings to the VILLAGE sewage system nor allow any changes of flow from units already hooked in, the ZBA instructed Mr. Ramsgard to again request VILLAGE sewer service for the addition to the Boathouse.

59. The ZBA instruction was given since "the Village in recent requests for expanded usage has been more responsive" thus recognizing the known fact that the VILLAGE was permitting others similarly situated to Plaintiffs to hook into the VILLAGE sewer system while denying Plaintiffs the same right.

60. The ZBA expressed its preference for the first of the three options, and also instructed the Plaintiffs to go back to the PLANNING BOARD for its input on the three plans.

61. On December 16, 2003, the PLANNING BOARD conducted a meeting at which it found that the first option presented by the Plaintiffs was preferable.

62. On December 24, 2003, in accordance with the preferences expressed by both the PLANNING BOARD and the ZBA, Plaintiffs submitted a Building permit application and an application to the ZBA for the necessary area variance to expand the Boathouse as required for the first option above.

63. On December 29, 2003, Plaintiffs' Building permit application was denied and they proceeded to the ZBA.

64. On January 6, 2004, the ZBA conducted a meeting on Plaintiffs' area variance application for the Boathouse expansion in connection with the option chosen by the ZBA and the PLANNING BOARD as being the preferred development option. The matter was scheduled for public hearing on February 3, 2004.

65. In reliance upon the agreements reached with the ZBA and the PLANNING BOARD on their respective preferences for development of Plaintiffs' property, and in anticipation of the granting of the variance applications, Plaintiffs then applied for a permit to demolish the Main House on the property which permit was granted on January 20, 2004.

66. On February 10, 2004, the ZBA issued its decision granting the variance application, conditioned upon the PLANNING BOARD approving the overall site plan and subdivision application.

PLAINTIFFS PROCEED TO PLANNING BOARD AFTER ZBA APPROVAL

67. On or about March 6, 2004, the Plaintiffs submitted their subdivision and site plan application and all supporting documents to the PLANNING BOARD.

68. On March 9, 2004, the PLANNING BOARD conducted a Special Meeting where a preliminary

hearing on the Plaintiffs' subdivision application was conducted, at which the Board required the Plaintiffs to pay $3,000 more into the escrow account. Plaintiffs promptly complied.

69. On April 20, 2004, the OCHD again reiterated that connection into VILLAGE sewer system is best, but that a community septic system would be an acceptable alternative.

70. At that time, in accordance with advice and approval from the OCHD and the DEC, the Plaintiffs proposed a community septic system to service all residential lots, given the VILLAGE'S denial of their request for additional connections to the VILLAGE sewer system and selective enforcement of the "no new connections" policy against them.

71. On May 18, 2004, a Public Hearing before the PLANNING BOARD was conducted, at which, among other things, Plaintiffs' engineer, Barry Pickard, made a detailed presentation with respect to the proposed septic system.

72. TOWN Engineer, Douglas Wickman stated that both the DEC and the OCHD assured him of the reliability of the proposed system, and Mr. Wickman further stated that for the proposed septic system it would be preferable to have a TOWN sewer district created rather than individual mound systems and rather than have a homeowner's association be responsible for the system.

73. The PLANNING BOARD thereafter issued a Negative Declaration under SEQRA by a 6 to 1 vote, with Defendant DESSA BERGEN voting against it.

74. At the public hearing, a standing room only crowd overwhelmingly spoke out in favor of the Plaintiffs' application.

75. Defendant, PLANNING BOARD Member DESSA BERGEN, then on the Board of Tri-County Skaneateles Lake Pure Water Association ("Tri-County") but not publicly disclosing this affiliation, opposed the Negative SEQRA Declaration and sought to keep the public hearing open, until after May 2004 so a moratorium could be enacted while the hearing on Plaintiffs' application was still open so as to put a halt to the application altogether until the laws could be changed.

76. Despite these efforts by Defendant DESSA BERGEN, the PLANNING BOARD voted 6 to 1 to close the public hearing that day, with the Defendant DESSA BERGEN, voting against it.

DEFENDANTS' USE OF THE SEWER SYSTEM ISSUE AS A MEANS TO FURTHER BLOCK PLAINTIFFS' DEVELOPMENT PLANS

77. On June 24, 2004, Plaintiffs' engineer, Barry Pickard transmitted a State Pollutant Discharge Elimination System ("SPDES") permit application to the DEC for the sewage treatment and disposal proposals.

78. On June 24, 2004, now Town Supervisor Phil Tierney, submitted a letter in his capacity as President of Tri-County, objecting to the Plaintiffs'

Negative Declaration and requesting to be considered an "interested party."

79. On June 29, 2004, a PLANNING BOARD meeting was conducted where further details of the community sewer system were discussed, and Plaintiffs' representatives made it clear to the PLANNING BOARD that if the TOWN BOARD does not approve a Town sewer district as preferred by the OCHD and DEC, then an alternative of individual septics for each property, less desirable from the viewpoint of the OCHD and DEC, would be considered as an alternative.

80. Defendant TUCKER as the PLANNING BOARD Chairman, advised he had had discussion with the TOWN BOARD regarding the creation of a sewer district.

81. Upon information and belief, the TOWN BOARD had already privately determined that it would not act on or would not approve any application for the creation of a sewer district.

82. On July 27, 2004, a PLANNING BOARD meeting was conducted at which time Plaintiffs' matter was adjourned to the September 21, 2004 meeting, but the Planning Board entertained a presentation by Plaintiffs' former consultant, Joel Russel, regarding proposed changes to the Zoning Code again delaying Plaintiffs while pushing forward with efforts to change the laws to prohibit Plaintiffs' development rights from vesting.

83. On August 3, 2004, following presentation on the status of the change in the laws, the PLANNING

BOARD wrote to Plaintiffs advising that the PLANNING BOARD may reconsider its prior SEQRA Negative Declaration at the upcoming September 21, 2004 meeting.

84. On September 20, 2004, the OCHD wrote to Barry Pickard, copied to TOWN Engineer Wickman, confirming that its review of the sewage plans was complete and the plans were acceptable, and that the only technical step still required was for a legal entity responsible for the system to make the application.

85. On September 21, 2004, the PLANNING BOARD conducted a meeting, at which TOWN Engineer Wickman stated that he agreed with the OCHD that the sewer plan was conceptually acceptable. Accordingly, as of September 21, 2004, all authorities having jurisdiction over sewer system issues had approved the sanitary sewer system in Plaintiffs' plans.

86. On October 7, 2004, Plaintiffs submitted all final documents again addressing any and all requests from the TOWN PLANNING BOARD and requested final approval, making clear yet again that the Plaintiffs were prepared to go forward with an application for the creation of a sewer district, or, alternatively with a Homeowner's Association responsible for the community septic.

87. On October 19, 2004, the PLANNING BOARD conducted a meeting, at which it again raised a number of additional new items in an effort to again delay Plaintiffs' plans to prevent vesting, but

all of which were agreed to by the Plaintiffs, and the PLANNING BOARD then again requested the Plaintiffs to request connection into the VILLAGE sewer system, notwithstanding the contrary position already communicated by the VILLAGE.

88. On November 5, 2004, complying again with the PLANNING BOARD's instructions, the Plaintiffs' attorney wrote a letter to VILLAGE Mayor Rhinehart advising that Preliminary Approval from OCHD, City of Syracuse, and DEC had been obtained for an on site community septic system, that a Petition would be brought before the TOWN BOARD to form a special Sewer District and requesting to be heard at the upcoming VILLAGE Board meeting on November 8, 2004.

89. On November 8, 2004, the VILLAGE Board conducted a meeting where the VILLAGE again rejected Plaintiffs' request to be connected to the VILLAGE sewer system.

90. On November 9, 2004, Plaintiffs' former attorney, Michael Byrne, Esq. wrote to Plaintiffs' attorney on behalf of the VILLAGE admitting that demolition of the Main House would result in a decrease of 17 bedrooms and would thus "significantly offset the sewer flow from the proposed new residences" but nevertheless confirming that the VILLAGE had once again denied the request, based simply on its policy allegedly adopted several years ago of not allowing new structures to hook in.

PLAINTIFFS WERE INTENTIONALLY SINGLED OUT AND TREATED DIFFERENTLY FROM OTHERS SIMILARLY SITUATED WITHOUT ANY RATIONAL BASIS

91. The Defendant VILLAGE's alleged "no new connections" policy, if in fact it existed for anyone but Plaintiffs, was riddled with exceptions and administered on an ad hoc basis.

92. Plaintiffs were selectively and adversely treated compared to others similarly situated based on impermissible considerations, including an intent to inhibit or punish Plaintiffs for their exercise of constitutional property rights and/or a malicious or bad faith intent to injure Plaintiffs.

93. Plaintiffs are presently aware of at least six (6) different property owners who were similarly situated to them inside the TOWN but outside the VILLAGE, but who were treated differently and upon information and belief there may be even more.

94. Plaintiffs' property is directly bordered by the Parkers on the north, the Skaneateles Country Club on the south, and Ralph Edmonds directly across the street on the west (the Lake is on the east). Each of the foregoing properties was similarly situated inside the TOWN and outside the VILLAGE, but treated differently from Plaintiffs and have been afforded the right to connect new structures to the VILLAGE sewer system and/or to add new flow to the system despite the alleged existence of a "no new connections" or "no new flow" policy.

95. Ralph Edmonds submitted a request for permission to connect a new home to the VILLAGE sewer system in or about 1987. No part of his property had ever been connected to the VILLAGE system prior to that point, and so this was a new sewer connection, necessarily resulting in additional positive net flow to the VILLAGE system.

96. The VILLAGE first told Mr. Edmonds that a sewer district must be created, but after he then applied for the creation of a district including himself and Plaintiffs and after the VILLAGE then had a private lengthy discussion with the TOWN, the VILLAGE then simply allowed Mr. Edmonds to connect without any further proceedings, without the creation of a formal sewer district, and without any restrictions on the flow created by this new hookup.

97. The Skaneateles Country Club re-built and expanded its facility in the early 1990's, and was permitted a significant expansion of its sewage producing facilities and membership base, despite the stated Defendant VILLAGE'S policy against new connections or expanded "redevelopment" of existing structures (and despite the fact that its access to the Village sewer system was allegedly granted by way of an easement through Plaintiffs' property at the same time Plaintiffs' property was originally given access).

98. Indeed, the Country Club was permitted to expand its outflows significantly more than any proposal suggested by Plaintiffs, as a membership

directory for 1988 includes 500 memberships and one for 2006 includes 606 memberships, despite the fact that it was not part of a formally enacted TOWN sewer district.

99. The Parkers' property (next door to Plaintiffs on the north and situated between Plaintiffs' property and Defendant VILLAGE Official Bruce Kenan's property) has been connected to the VILLAGE sewer system for decades through the same "past arrangements" with the VILLAGE as had been made for Plaintiffs' property.

100. Defendant VILLAGE Official Bruce Kenan acquired a portion of the Parkers' property adjacent to his own (thus expanding his property even closer to Plaintiffs), as a result of which the Parkers then constructed, in or about 2004, a brand new house on the remaining property.

101. This new home was permitted connection to the VILLAGE sewer system, notwithstanding the brand new flows that it created and notwithstanding the alleged "no new connections" policy that was selectively enforced against Plaintiffs, right next door.

102. Mr. Gary Dower, an associate of Defendant VILLAGE Official Bruce Kenan, constructed a luxury spa called Mirbeau Inn and Spa on property located in the TOWN but outside the VILLAGE in the late 1990's, resulting in significant new flow to the VILLAGE sewer system. The VILLAGE allowed this politically powerful property connection to the VILLAGE sewer system, notwithstanding the alleged

"no new connections" policy enforced against Plaintiffs.

103. Victor Ianno was also granted permission in or about 1998 to create an expanded sewer district for a development on property he owned in the TOWN but outside the VILLAGE, notwithstanding the Defendant VILLAGE's "policy" against such connections enforced against Plaintiffs, and notwithstanding that the new development would result in significant new flows to the VILLAGE system. The expanded sewer district was created for Mr. Ianno, but as detailed below, the same consideration was not afforded to Plaintiffs who were similarly situated.

104. Chase Design constructed a new large commercial building on property it owned outside the VILLAGE but in the TOWN and requested permission to connect to the VILLAGE sewer system adding significant new flows. Unlike the treatment afforded to Plaintiffs who were similarly situated, the TOWN heard, acted upon, and granted the petition for the creation of a new sewer district and, despite the existence of the VILLAGE's "no new connections" policy, the VILLAGE allowed it to connect to the VILLAGE system.

DEFENDANTS CONTINUE TO DELAY AND THWART PLAINTIFFS' PLANS

105. On November 10, 2004, the OCHD again confirmed in writing that Plaintiffs' sewage disposal plans were complete and acceptable, but that full

approval could not be issued until a completed application was submitted by the TOWN or other legal entity, following the creation of a municipal sewer district for the project.

106. On November 15, 2004, the Plaintiffs' attorney advised the PLANNING BOARD that the VILLAGE had again rejected Plaintiffs' proposal to connect into the VILLAGE sewer system.

107. On November 16, 2004, the PLANNING BOARD conducted a meeting and voted to again increase the escrow requirement by $5,000 (which Plaintiffs promptly paid), and stated that it would not act further on the application unless and until the TOWN BOARD has acted on the application for the creation of a sewer district.

108. On November 23, 2004, the PLANNING BOARD conducted a meeting, at which time the PLANNING BOARD was requested to continue its review of the subdivision at the December 21, 2004 meeting, but the PLANNING BOARD stated that the review would only continue after a decision is made by the TOWN BOARD regarding the sewer district.

109. PLANNING BOARD members, and at least PLANNING BOARD Chairman TUCKER, already knew based upon private, non-public conversations and information, that the TOWN BOARD intended to delay decision on the sewer Petition until the laws could be changed to outlaw it, or, if otherwise forced to make a decision before the laws could be changed, to arbitrarily deny any such application.

110. On November 24, 2004, TOWN BOARD Attorney James Murphy, Esq. wrote a letter to Plaintiffs' attorney acknowledging the request for a sewer district, advising that the proposed district would be "District #7" but claiming falsely that the TOWN BOARD "was completely unfamiliar with any of the discussion that you have had with the Planning Board concerning the technology and viability of the proposed common system."

111. Contrary to this representation, the TOWN BOARD members were familiar with the discussions regarding the technology and viability of the proposed common system, as the TOWN BOARD members had all personally attended the May 18, 2004 PLANNING BOARD meeting where all details of the technology and viability of the system were thoroughly presented, and at the June 29, 2004 PLANNING BOARD Meeting Chairman TUCKER publicly stated that he had already discussed the issues "informally" with the TOWN BOARD at that time.

112. The TOWN BOARD's intent in having its attorney take this position contrary to the facts was one of delay and obstruction of Plaintiffs' development plans and violation of Plaintiffs' Constitutional rights.

113. On December 10, 2004, the Plaintiffs submitted a Petition to the TOWN BOARD to establish a sewer district, along with a request to be placed on the next TOWN BOARD agenda in relation to same.

114. On December 16, 2004, the TOWN BOARD conducted a meeting where Plaintiffs' attorney pre-

sented the sewer district Petition. Given the VILLAGE's arbitrary actions, Plaintiffs' attorney explained that Plaintiffs were proceeding with alternative sewage plans and that they had been informed by the PLANNING BOARD and all other relevant governmental agencies that a community sewage disposal system instead of individual mound systems was preferable.

115. The TOWN BOARD requested further information despite the fact that all professionals who had already fully investigated the technology, including those hired by the TOWN, the County, and the State, had all already found it superior and acceptable.

116. Defendant, Supervisor PAVLUS stated that he would "not be in a hurry to approve anything," and the matter was placed on the agenda for January 6, 2005.

117. On December 20, 2004, in reliance upon the fact that all conditions for the final approval of the subdivision and site plan approval had effectively been met, the Plaintiffs lawfully demolished the Main House on the property pursuant to the previously issued demolition permit.

118. On December 27, 2004. the first draft of the proposed new Subdivision Regulations targeted at Plaintiffs' development rights was released by the Defendants.

MERITLESS LITIGATION IS FILED TO BLOCK PLAINTIFFS' DEVELOPMENT PLANS

119. On December 30, 2004. CPCS and Tri-County filed a meritless Article 78 proceeding in New York State Supreme Court for Onondaga County (Index No. 8473/04) challenging the Negative SEQRA Declaration issued by the PLANNING BOARD, in an effort to halt the progress and final approval of Plaintiffs' development plan.

120. On December 31, 2004, CPCS and Tri-County lawyers wrote to the TOWN BOARD claiming that pursuant to New York State Town Law § 282 any and all proceedings in furtherance of the subdivision proposal were stayed until the matter is decided, and falsely and erroneously advising that the TOWN BOARD could not consider the proposal to create die sewer district at the upcoming January 6, 2005 meeting.

121. On January 5, 2005, a local newspaper, the Skaneateles Press, printed a letter written by Holland Gregg on behalf of the CPCS, where Holland Gregg admitted that the Article 78 proceeding was commenced with the specific intent of causing a "suspen[sion] of action on the Ruston application until the town board can finish the update of the Comprehensive Town Plan, including the adoption of a cohesive zoning law that more accurately articulates the community's vision of the town's lake watershed area,"

122. On January 6, 2005, TOWN Attorney John Shannon, Esq. wrote a letter to Plaintiffs' attorneys advising that the TOWN BOARD would not be able to hear the Plaintiffs' presentation that night "due to the pending lawsuit and the length of the agenda."

123. On January 6, 2005, Plaintiffs' attorney responded by letter to John Shannon objecting to the claimed stay, correctly advising that any such stay would merely apply to further actions of the PLANNING BOARD, not the TOWN BOARD.

124. On January 6, 2005, Defendant, Supervisor PAVLUS was quoted in a local newspaper, The Post-Standard, as follows with regard to Plaintiffs' property: "I would have loved to have seen somebody acquire and maintain it as one large estate, but if you haven't got somebody who wants to . . .?" implying that there are other means of maintaining the property as one large estate, such as through delay, obstruction, and violation of Constitutional rights.

125. On March 24, 2005, Bruce Kenan, the longest tenured member of the VILLAGE PLANNING BOARD, submitted an Affidavit, in his alleged capacity as a member of Tri-County claiming that he would suffer actual injuries as a result of the Plaintiffs' project in various ways.

126. On June 8, 2005, the Hon. Edward D. Carni, J.S.C., issued a Decision granting the motions for summary judgment submitted by the Defendants in the frivolous Article 78 proceeding litigation and

properly dismissed the lawsuit. No appeal was ever perfected therefrom.

127. The TOWN BOARD and the PLANNING BOARD then continued to wrongfully and illegally fail and refuse to take any substantive action whatsoever on any of the Plaintiffs' applications until the new Comprehensive Plan and Zoning Code changes (specifically designed and drafted to destroy Plaintiffs' development rights), were finally enacted long after all substantive approvals had otherwise been assured and almost a year after the Sewer District Petition was submitted and the meritless Article 78 Petition filed.

DEFENDANTS PROPOSED A NEW COMPREHENSIVE PLAN TO BLOCK PLAINTIFFS' DEVELOPMENT EFFORTS

128. On January 20, 2005 (just weeks after the Plaintiffs submitted the Sewer District Petition and demolished their home) the Draft Comprehensive Plan was made public targeting the Plaintiffs' development rights.

129. On January 27, 2005, Defendant, DESSA BERGEN, finally after four years of reviewing the Plaintiffs' development proposals, recused herself from further review of Plaintiffs' application because she was a member of the Board of Tri-County, which had been explicitly and consistently fighting the Plaintiffs' applications to develop their property since at least January 2, 2001, but without any prior disclosure of her connection with that organization.

130. On January 31, 2005, the proposed revisions to the TOWN Zoning Code, also targeted at the Plaintiffs' development rights, were made public.

131. On January 31, 2005, a Special Meeting was conducted to introduce the January 20, 2005 updated Draft Comprehensive Plan, and on February 8, 2005, a "Public Informational Meeting" on the proposed Draft Comprehensive Plan was conducted and was led by Defendant PAVLUS.

132. At the February 8, 2005 meeting, Joel Russell (Plaintiffs' former advisor and now a professional engaged by the Town) confirmed by multiple comments that Plaintiffs' development proposal was indeed the primary driving factor behind the proposed revisions.

133. Mr. Russell also confirmed that the changes to the Comprehensive Plan took an arbitrary position with respect to sewage, singling out and targeting Plaintiffs' sewage proposals for their property.

134. Joel Russell also confirmed that the new law changes singled out, targeted and intended to thwart Plaintiffs' already approved plans for the expansion of their Boathouse.

135. There is no other existing boathouse on the Lake within the unincorporated TOWN with designed facilities for people to live in other than Plaintiffs' boathouse and the provisions announced were directly targeted at Plaintiffs' property and their proposal to expand their Boathouse and make it their primary residence.

AFTER MERITLESS LITIGATION IS DISMISSED, DEFENDANTS STILL FAIL TO PROCESS PLAINTIFFS' DEVELOPMENT APPLICATION

136. On July 1, 2005, Plaintiffs' attorney wrote to the TOWN Attorney requesting a meeting to discuss the Plaintiffs' pending applications before the PLANNING BOARD and TOWN BOARD.

137. On or about July 5, 2005, TOWN PLANNING BOARD Attorney Mary Kendrick-Gaffney communicated to Plaintiffs' attorney her position that Plaintiffs' rights in the development were "not vested" and that when (not if) the new ordinance is enacted, the Plaintiffs will be subject to it.

138. On or about July 11, 2005, the TOWN and VILLAGE adopted the new Joint Comprehensive Plan, which arbitrarily singled out Plaintiffs' property and proposals.

139. On July 21, 2005, Plaintiffs' attorney scheduled a meeting with the TOWN ATTORNEY and TOWN PLANNING BOARD Attorney for July 28, 2005, confirmed by letter, to again request action on the long delayed outstanding applications.

140. On July 26, 2005, Plaintiffs' attorney wrote to the TOWN requesting action on the Plaintiffs' applications reiterating that the only remaining matter to be addressed in connection with approval of the subdivision and site plan applications was the formation of a sewer district, and advising that Plaintiffs were prepared to proceed with several alternatives.

141. On July 28, 2005, Plaintiffs' attorney met with TOWN Attorney, John Shannon, Esq., who admitted that because of approval from OCHD, the TOWN was compelled to consider Plaintiffs' application for a sewage district. Mr. Shannon further stated to Plaintiffs' Attorney that under the "current administration," an application for either a transportation corporation or the creation of a sewer district would be denied since Defendant PAVLUS and others were "adverse" and all requests thereafter to have the TOWN BOARD consider the sewer district petition were ignored, obstructed, or delayed.

142. On August 3, 2005, Plaintiffs' attorney orally requested to be added to the next PLANNING BOARD agenda.

143. On August 9, 2005, Plaintiffs' attorney wrote to the PLANNING BOARD requesting to be placed on the PLANNING BOARD agenda for August 16, 2005 to discuss the final plans submitted in December, 2004.

144. Plaintiffs' attorney requested final approval at the upcoming meeting, since the only outstanding issue at that point related to the outstanding request to the TOWN BOARD to establish a sewer district.

145. On August 10, 2005, the PLANNING BOARD requested additional copies of maps already previously provided in an effort to delay yet again, but the Plaintiffs then promptly provided these maps again as requested.

146. On August 15, 2005, Plaintiffs were notified for the first time that the PLANNING BOARD had refused to place the matter on the agenda.

147. On August 16, 2005, Plaintiffs' attorney wrote to the TOWN PLANNING BOARD attorney documenting the Plaintiffs' efforts to be placed on the August 16, 2005 agenda, and requested confirmation in writing as to when the application will be placed back on the PLANNING BOARD agenda and requesting to be placed on the special meeting agenda for August 23, 2005.

148. On August 17, 2005, the TOWN PLANNING BOARD Attorney wrote back to Plaintiffs' attorney refusing to place the matter on the agenda and even asserting for the first time that the prior variances granted by the ZBA with regard to the Boathouse have expired.

149. On August 18, 2005, the TOWN BOARD conducted a meeting, with no mention of Plaintiffs' application on the agenda.

150. On September 2, 2005, since the TOWN BOARD had arbitrarily and illegally continued to take no action whatsoever on the Plaintiffs' application for the creation of a sewer district, Barry Pickard met with the OCHD to discuss a plan for individual septic mound systems to be used as an alternative to the community system.

151. On October 11, 2005, the continued public hearing was conducted and closed on the proposed changes to the Zoning Code and Subdivision Regulations, at which Defendant DESSA BERGEN, specifi-

cally commented that she was pleased to see that sewage treatment facilities are prohibited in the watershed overlay district (such as those proposed in Plaintiffs).

152. On October 21, 2005, a completed "Application for Approval of Sanitary Facilities for Realty Subdivision" was submitted to the OCHD on behalf of Plaintiffs for alternative individual septic mounds.

153. On October 21, 2005. since the TOWN BOARD would not act on the pending Petition for creation of the sewer district and had communicated that it would not even approve a Transportation Corporation to administer the community septic system. Plaintiffs' attorney hand-delivered a letter to the PLANNING BOARD enclosing 11 sets of revised site plans showing individual septic units.

154. The letter again requested the PLANNING BOARD to review and approve this alternate site plan and preliminary plan, in light of the minimal nature of the changes, and requested again to be placed on the agenda of the first PLANNING BOARD meeting available.

155. On October 26, 2005, TOWN Attorney John Shannon, Esq. wrote to Plaintiffs' attorney stating that "some individuals opposed to the community septic systems were suggesting that the Town could summarily refuse to hear the application" for a sewer district, but, as correctly set forth in Mr. Shannon's letter, the TOWN had a legal responsibility to hear the Petition then make a decision.

Mr. Shannon directed the Plaintiffs to contact Janet Aaron to be placed on the TOWN BOARD agenda.

156. On November 2, 2005, Plaintiffs' attorney wrote to John Shannon, Esq. reminding him that although the TOWN Supervisor, Defendant PAVLUS, had taken the irrational and arbitrary position in December, 2004 that he would not entertain any further proposals relevant to the Petition until an independent TOWN engineer reviewed the sewer plans, the TOWN engineer (Mr. Wickman), OCHD, Syracuse Water Department, and the DEC had all already reviewed and approved the plan, and Plaintiffs' attorney again requested to be placed on the next TOWN BOARD agenda to advance the application.

157. On November 7, 2005, Plaintiffs' attorney submitted to the TOWN PLANNING BOARD 10 copies of the preliminary plan relating to the individual septic systems rather than a community septic system. This preliminary plan was unchanged from the prior plan, with the only change being that the new plan now simply showed the necessary sanitary easements for the individual septic units.

158. On November 7, 2005, Plaintiffs' attorney also wrote to John Shannon, Esq. reiterating Plaintiffs' request that the TOWN BOARD consider the sewer district Petition and create the sewer district.

159. On November 9, 2005, the TOWN PLANNING BOARD Attorney refused to place the matter on the

November 2005 PLANNING BOARD agenda and stated that the matter could only be placed on the December 2005 agenda. This was delay was intentional and calculated, since the said attorney knew that the changes to the Zoning Code were to be enacted by the TOWN BOARD at its December 1, 2005 meeting.

160. On November 10, 2005, Plaintiffs' attorney wrote to the PLANNING BOARD advising that the failure to place the matter on the November 2005 agenda was a continuation of the PLANNING BOARD's failure to properly consider this ongoing application that had been pending before the PLANNING BOARD for years.

161. On November 14, 2005, the TOWN PLANNING BOARD Attorney wrote to Plaintiffs' attorney advising that the matter could be reviewed at the December 20, 2005 PLANNING BOARD meeting at the earliest and confirmed the reason behind the PLANNING BOARD's refusal to place the matter on any earlier agenda, when she wrote that: "I still anticipate that the proposed Zoning and Subdivision laws will be enacted at the end of November or beginning of December, 2005. If the new laws are enacted, the proposed subdivision will have to comply with new laws" and adding a gratuitous postscript as follows: "P.S. The prior variance is expired and the PLANNING BOARD cannot approve the addition to the structure on Lot 1 without a new variance from the ZBA."

162. On November 16, 2005, at 5:24 p.m., the TOWN Clerk wrote to the Plaintiffs' attorney refusing to place the sewer Petition on the November 17, 2005 agenda as requested, and instead placing it on the December 1, 2005 agenda.

163. The failure to place the matter on the TOWN BOARD agenda prior to December 1, 2005 was intentional to delay action on Plaintiffs' plan until a new Zoning Code adverse to Plaintiffs was enacted

164. On December 1, 2005, the TOWN BOARD conducted a meeting, where the amendment to the Zoning Code and Subdivision Regulations were items 6, 7, 8, and 9 on the agenda, while Plaintiffs' sewer Petition was number 10 on the agenda. The changes in the Code were enacted, and the Plaintiffs' Petition for a sewer district, now made illegal under the newly enacted Code, was then considered.

165. The TOWN BOARD declared itself lead agency under SEQRA for a review of the proposal and required Plaintiffs to post $5,000 for yet another independent engineering review notwithstanding the fact that it had already been thoroughly and completely reviewed by the Town's own engineers.

166. All of the foregoing constituted an admission that the old Zoning Code would apply to the pending application, since there was no other rational purpose in conducting any review of the Petition under the new Code which made the creation of the sewer district illegal.

167. The foregoing further demonstrates the irrational, bad faith, outrageously arbitrary and capricious nature of the Defendants' conduct herein, as there was simply no point, beyond taking the Plaintiffs' time and money, to request a $5,000 review of a Petition that the Board had just made illegal only minutes before.

168. On December 8, 2005, Plaintiffs' attorney wrote to the TOWN BOARD, enclosing the $5,000 escrow requested by the TOWN BOARD on the express condition that the Plaintiffs' application were to be considered by both Boards respectively, under the law prior to December 1, 2005.

169. When no response was received, on December 19, 2005, Plaintiffs' attorney wrote to TOWN PLANNING BOARD Attorney requesting a response to the December 8, 2005 letter.

170. On December 19, 2005, TOWN PLANNING BOARD Attorney, Mary Kendrick-Gaffney wrote to Plaintiffs' attorney advising that the project would be governed by the newly enacted laws, and expressing her opinion that the variance "has expired but I cannot speak for the Board without discussing [it] with them. . . ."

171. On December 20, 2005, the TOWN Clerk wrote to Plaintiffs' attorney that it is the TOWN BOARD's position that the Plaintiffs' application must be governed by the law in existence at the time of approval and returning the $5,000 escrow check.

DEFENDANTS' NEW COMPREHENSIVE PLAN, ZONING CODE AND SUBDIVISION REGULATIONS UNEQUALLY APPLY TO PLAINTIFFS' PREMISES

172. The newly enacted laws were targeted at the Plaintiffs' development and substantially impair their property rights, and fail to treat substantively similarly situated properties equally, with examples set forth herein below.

173. The Joint Comprehensive Plan (the "Plan") enacted on July 11, 2005 specifically recognizes that "[z]oning restrictions and the availability of water and sewer facilities will influence the location and nature of future growth." [p. 8].

174. The Plan also explicitly recognizes that the "VILLAGE has made a conscious decision not to expand the sewer plant's capacity." [p.9].

175. The Plan further explicitly recognizes that the absence of a TOWN sewage treatment facility creates a need for new municipal sewer districts in the TOWN, but then states that "any such Sewer District may only be created to serve areas outside of the Skaneateles Lake Watershed." [p. 19-20].

176. This provision was targeted specifically at the Plaintiffs who are the only ones in the watershed in the TOWN to have applied for the creation of a sewer district.

177. The Plan also states that "privately owned treatment systems that serve multiple owners should be prohibited" [p.20].

178. This provision was targeted specifically at the Plaintiffs to prevent them from implementing a privately owned community system as part of their plans for development.

179. The Plan recognizes explicitly that the very first objective of these changes is "[t]o discourage development where public sewage disposal services are not available" [p. 20], including, apparently, locations where public sewage disposal services in fact are already available, but where the VILLAGE and TOWN do not want them to be available.

180. The Local Law 2005-E enacting significant changes to the Town Zoning Code was also enacted with numerous provisions specifically targeted at the Plaintiffs' property.

181. The new Zoning Code states that it was enacted to "limit . . . building in areas where it would conflict with the town's rural pattern and scale of development" and goes on to specifically state its objective to "maintain large areas of contiguous open space" such as the Plaintiffs' property "in their current undeveloped state. . ." (Zoning Law § 148-1(C)(2) and (3)).

182. The new Zoning Code increases the lakefront setback from a required 60 feet to a required 100 feet, which would require the two new homes on Plaintiffs' plans on the waterfront to be moved much farther away from the Lake, which, in turn, would also adversely affect the number, size and location of all proposed lots, eliminating any lake view for most such other lots. (Zoning Law § 148).

183. Plaintiffs are the only ones in the TOWN with property proposing any new buildings between 60 and 100 feet from the shoreline in a subdivision. By increasing the setbacks from the shoreline, Defendants prohibited development on Plaintiffs' level, buildable and most valuable lots.

184. In order to comply with this section of the new Code, the two new proposed lakefront homes in Plaintiffs' proposal would have to be moved to an area of the property with slopes greater than 30%, which was otherwise permissible under the old Code.

185. However, the new Zoning Code also prohibits any construction on slopes greater than 30%. (Zoning Law § 148-30(B)).

186. The intended and targeted combined effect of the aforementioned two sections of the code is to prohibit any new true "lakefront" homes on Plaintiffs' property at all, as any new "lakefront" homes could only be constructed in excess of 400 feet from the lake, and to also eliminate any lake view from any of the other non-lakefront lots.

187. There were no other applications submitted for performance subdivisions for development along the lakefront in the history of the TOWN other than the one submitted by the Plaintiffs and these provisions were directed and targeted specifically at the Plaintiffs.

188. The new Zoning Code also affirmatively targets Plaintiffs' Boathouse by setting forth that "Non-conforming boathouses shall not be expanded

under any circumstances and no expansion of nonconforming residential uses within boathouses shall be permitted. No kitchen or bathroom facilities shall be installed in such boathouses." (Zoning Law § 148-12(C)(6)).

189. The new Zoning Code goes on to state that "No living quarters shall be allowed in a boathouse. No boathouse shall be used for any purpose other than storage." (Zoning Law § 148.36(A)(2)(b)).

190. Accordingly, the new Code purports to outlaw the plans Plaintiffs which were a critical part of the Plaintiffs' development applications and investment backed expectations.

191. Plaintiffs were the only property owners proposing any expansion or alteration, including the installation of any additional kitchen or bathroom facilities, in an existing boathouse, and these provisions in the new Code were specifically targeted at the Plaintiffs.

192. The new Zoning Code also changed the allowable buildable land on Plaintiffs' property, including by way of changes in density requirements, the removal of density bonuses or transfers only for performance subdivisions within the lake watershed by changing the "steep slope" provisions, all of which were designed to and have the effect of allowing fewer total lots on the Plaintiffs' property. (Zoning Law § 148-9).

193. The aforementioned changes were directed specifically at Plaintiffs' proposal, which was the

only performance subdivision proposed in the lake watershed in the TOWN.

194. The new Zoning Code would also permit only four of the eight proposed non-lakefront lots to share the 40 linear feet of lake frontage, thereby significantly reducing the value of all other proposed non-lakefront lots. (Zoning Law § 148-36(C)).

195. The new Zoning Code also purported to enact an unconstitutionally vague provision, whereby all applications for major subdivisions and for minor subdivisions within the Lake Watershed Overlay District must submit to a "conservation analysis" that gives the PLANNING BOARD unbridled and sole discretion over the development of Plaintiffs' property, permitting the PLANNING BOARD, in its unabridged and sole discretion, to reduce or eliminate any development at all based upon the individual members' own subjective evaluation of which features on an applicant's property they deem to be of "conservation value". (Zoning Law § 148-9(C)and G(1)).

196. The new Zoning Code and Subdivision Regulations purport to allow the PLANNING BOARD to impose restrictions designed to preserve features which in its sole discretion it deems to be "important" including, for example, what it deems to be a "scenic view," thus permitting the Planning Board to order a view to be preserved regardless of an applicant's other rights under the Code, all of which render such provisions unconstitutionally vague and void.

197. The new Zoning Code also specifically prohibits any privately owned package sewage treatment plants serving multiple owners, and further prohibits any type of sewage treatment facility (including "a sewage disposal management district"), but arbitrarily, illegally, and unconstitutionally only applies this provision to properties in the Lake Watershed Overlay District. (Zoning Law §§ 148-8(C) and 148-56).

198. These provisions in the Code were also targeted specifically at the Plaintiffs, as they were the only ones proposing any of the proscribed methods of sewage disposal in the Lake Watershed Overlay District.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

199. Plaintiffs repeat and reallege paragraphs 1 through 198 as if fully set forth herein.

200. The Fifth and Fourteenth Amendments of the United States Constitution guarantee all persons, including the Plaintiffs, due process of law.

201. The foregoing constitute clearly established statutory or constitutional rights of which a reasonable person, and the Defendants, would have known.

202. Plaintiffs have constitutionally protected property rights in the ownership, occupation, and use of the Premises and all rights attendant thereto, including but not limited to the right to use,

enjoy, and develop their property in accordance with the laws and zoning codes in effect prior to the enactment of the new Joint Comprehensive Plan, and the new Zoning Code and Subdivision Regulations as aforesaid, as well as the right to have their applications processed, considered and decided in accordance with the law.

203. Defendants, TOWN BOARD, PLANNING BOARD, BILL PAVLUS, THADDEUS ASTEMBORSKI, BARBARA SPAIN, DAVID G. LAXTON, THEODORE MURDICK, MARK TUCKER, JOSEPH SOUTHERN, KENNETH JONES, ALAN BRIGGS, LEWIS WELLINGTON, DESSA BERGEN and ROBERTY LOTKOWICTZ (the "Town Defendants") impaired, destroyed, infringed upon and/or interfered with Plaintiffs' property rights in an outrageously arbitrary and capricious manner for improper and malicious purposes with the intent to injure Plaintiffs.

204. The Town Defendants abused the zoning and legislative process in the TOWN to deprive Plaintiffs of lawful use and enjoyment of their property, out of impermissible personal and political animus.

205. The Town Defendants deliberately and improperly interfered with the process by which, and the laws pursuant to which, the TOWN issues permits and approvals, in order to block or delay the issuance of the various approvals sought by Plaintiffs for reasons unrelated to the merits of the applications, and engaged in a campaign of harassment and delay designed to deny Plaintiffs their

property rights and/or to force Plaintiffs to abandon their development proposals.

206. By reason of the foregoing, the Town Defendants have violated and continue to violate the rights of the Plaintiffs under the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

207. In taking all actions alleged in this Complaint, the Town Defendants acted under color of state law, pursuant to a formally adopted policy, and with deliberate indifference and/or callous indifference to the Plaintiffs' federally protected rights.

208. As a direct and proximate result of the Town Defendants' conduct, Plaintiffs have suffered a distinct and actual injury to their civil rights.

209. As a direct and proximate result of the above-referenced actions, Plaintiffs' Fifth and Fourteenth Amendment rights to Due Process have been violated by the Town Defendants and Plaintiffs have suffered and will continue to suffer substantial losses. The amount of such losses shall be determined at trial, but in no event less than $25,000,000.00.

SECOND CLAIM FOR RELIEF

210. Plaintiffs repeat and reallege paragraphs 1 through 209 as if fully set forth herein.

211. The Defendants selectively treated the Plaintiffs as compared with others similarly situated.

212. The Defendants' actions as aforesaid were not rationally related to a legitimate governmental interest.

213. The Defendants' actions in treating Plaintiffs differently from those similarly situated were invidious and wholly arbitrary.

214. The Defendants singled out the Plaintiffs with malevolent or bad faith intent to injure the Plaintiffs and/or to inhibit or punish the Plaintiffs' exercise of their constitutional property rights and/or rights of freedom of association.

215. No rational person could regard the circumstances of the Plaintiffs to differ from those of the others similarly situated as aforesaid to justify the differential treatment on the basis of a legitimate government policy, and the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the Defendants acted on the basis of a mistake.

216. The Defendants, by their acts, have abridged and violated the rights of Plaintiffs to Equal Protection in breach of 42 U.S.C. §§ 1983 and in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

217. As a direct and proximate result of the above-referenced actions, Plaintiffs' Fifth and Fourteenth Amendment rights to Equal Protection have been violated and Plaintiffs have suffered and will continue to suffer substantial losses. The amount of such losses shall be determined at trial, but in no event less than $25,000,000.00.

THIRD CLAIM FOR RELIEF

218. Plaintiffs repeat and reallege paragraphs 1 through 217 as though set forth in full herein.

219. The new Town Zoning Code, Subdivision Regulations and Comprehensive Plan provisions regarding the requirements to obtain land use approvals are so vague as to be unconstitutional and are void.

220. The new Town Zoning Code, Subdivision Regulations and Comprehensive Plan provisions contain terms that are so unclear that a person of ordinary intelligence does not have a reasonable opportunity to know what is prohibited, so that he may act accordingly.

221. The new Town Zoning Code, Subdivision Regulations and Comprehensive Plan provisions lack explicit standards for those who apply them and are subject to arbitrary or discriminatory enforcement.

222. The new Town Zoning Code, Subdivision Regulations and Comprehensive Plan provisions are impermissibly vague since they abut upon sensitive areas of basic First Amendment freedoms in such a way as to operate to inhibit the exercise of those freedoms.

223. The new Town Zoning Code, Subdivision Regulations and Comprehensive Plan on their face violate Plaintiffs' rights to Substantive Due Process, as in all of their possible applications to Plaintiffs, they lack any legitimate reason and are

arbitrary, capricious, and not rationally related to any legitimate government interest.

224. The enactments of the new Town Zoning Code, Subdivision Regulations and Comprehensive Plan were arbitrary, capricious, unreasonable, malicious, improperly motivated, and conscience shocking, sought to deprive the Plaintiffs of the use of their property, whereas others similarly situated are not subject to the requirements and restrictions in the said Code, Regulations, and Comprehensive Plan, and the Defendants irrationally distinguished between similarly situated classes.

225. The said Code, Regulations, and Comprehensive Plan arbitrarily enacted restrictions applicable only to Plaintiffs' property and designed only to thwart Plaintiffs specific plans without any relation to any legitimate governmental interest.

226. The Defendants knew what Plaintiffs' plans were for their property and its use and intentionally enacted the said Code, Regulations, and Comprehensive Plan to prohibit the use planned by Plaintiffs.

227. By reason of the foregoing, the Town Zoning Code, Subdivision Regulations, and Comprehensive Plan should be declared void for vagueness, void for having violated the Plaintiffs' Substantive Due Process Rights, and void for having violated Plaintiffs' Rights to Equal Protection.

228. As a direct and proximate result of the above-referenced actions in enacting the said Code, Regulations, and Comprehensive Plan, Plaintiffs'

Fourteenth Amendment rights to Due Process and Equal Protection have been violated by Defendants and Plaintiffs have suffered and will continue to suffer actual damages and substantial losses. The amount of such losses shall be determined at trial, but in no event less than $25,000,000.00.

FOURTH CLAIM FOR RELIEF

229. Plaintiffs repeat and reallege paragraphs 1 through 228 as though set forth in full herein.

230. By reason of the expenditures and other efforts by the Plaintiffs concerning the subject premises, the right of the Plaintiffs to develop pursuant to the laws, rules, and regulations in effect prior to the enactment of the new Joint Comprehensive Plan, new Zoning Code, and Subdivision Regulations enacted on December 1, 2005 as aforesaid has vested.

231. Further, the Defendants acted in bad faith and unduly delayed acting upon Plaintiffs' various applications as aforesaid for the purpose of changing the laws applicable thereto.

232. The Defendants delayed rendering determinations as to Plaintiffs' various applications as aforesaid and such delay was the product of malice, bad faith, oppression, manipulation or corruption.

233. By reason of the foregoing, this Court should declare that any development of the premises shall be pursuant to the prior Town Comprehensive Plan, Zoning Code, and other Regulations regarding property development.

RELIEF SOUGHT

WHEREFORE, Plaintiffs, LAWRENCE RUSTON and JANET RUSTON, demand Judgment against all Defendants as follows:

(1) As to the First Claim for Relief:

a. Compensatory damages against Defendants in an amount to be determined at trial, but in no event less than $25,000,000;

b. Awarding Plaintiffs their costs, disbursements and reasonable attorneys' fees incurred in the prosecution of this action, pursuant to 42 U.S.C. § 1988;

(2) As to the Second Claim for Relief:

a. Preliminarily and permanently enjoining the Defendants and all others acting in concert with them from undertaking any and all action in furtherance of the selective enforcement and. any other individual or official act in furtherance of these illegal acts;

c. Compensatory damages against Defendants in an amount not less than $25,000,000.00;

d. Awarding Plaintiffs their costs, disbursements and reasonable attorneys' fees incurred in the prosecution of this action, pursuant to 42 U.S.C. § 1988;

(3) As to the Third Claim of Relief:

a. Declaring that the TOWN Zoning Code and Subdivision Regulations are unconstitutionally vague and that the enactment of the Joint Compre-

hensive Plan, Zoning Code, and Subdivision Regulations violate the Plaintiffs Substantive Due Process and Equal Protection Rights on their face and are void pursuant to the Fifth and Fourteenth Amendments to the United States Constitution;

b. Preliminarily and permanently enjoining the Defendants and all others acting in concert with them from enforcing the provisions of the said Code and Regulations;

c. Awarding compensatory damages against Defendants in an amount not less than $25,000,000.00;

d. Awarding Plaintiffs their costs, disbursements and reasonable attorneys' fees incurred in the prosecution of this action, pursuant to 42 U.S.C. § 1988;

(4) As to the Fourth Claim for Relief:

a. Declaring that Plaintiffs' rights to develop their property pursuant to the prior Comprehensive Plan, Zoning Code, and other Regulations have vested;

b. Declaring that any development of the Plaintiffs' premises shall be pursuant to the prior Town Comprehensive Plan, Zoning Code, and other Regulations regarding property development;

c. Awarding Plaintiffs their costs, disbursements and reasonable attorneys' fees incurred in the prosecution of this action, pursuant to 42 U.S.C. § 1988;

Granting such other, further and different relief as to this Court seems just, proper and equitable.

The Plaintiffs demand a trial by jury on all issues entitled to be tried by a jury.

Dated: South Nyack, New York
January 12, 2009

FEERICK LYNCH MACCARTNEY, PLLC

/s/ _____
By: Dennis E. A. Lynch (302161)
Attorney for Plaintiffs
96 South Broadway
South Nyack, New York 10960
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United States Court of Appeals,
Third Circuit.

Emmett J. MANN, Appellant

v.

John S. BRENNER; Dave Redshaw; Don Hoyt; Robert A. Kinsley; Matt Jackson; City of York; York College; Redevelopment Authority of the City of York; Steven R. Buffington; Officer Wentz.

No. 09-2461.

Submitted Under Third Circuit LAR 34.1(a)
March 23, 2010.
Filed: March 30, 2010.

Background: Property owner brought § 1983 action against city, its agents, and college, alleging retaliation, malicious prosecution, and violation of his due process and equal protection rights. Defendants moved to dismiss for failure to state a claim. The United States District Court for the Middle District of Pennsylvania, Yvette Kane, J., 2008 WL 4491950, granted motions. Owner appealed.

Holdings: The Court of Appeals, Jordan, Circuit Judge, held that:
(1) owner failed to state a First Amendment retaliation claim;
(2) owner failed to state a claim of malicious prosecution;

(3) owner was collaterally estopped from litigating claim that he was unfairly harassed into a condemnation proceeding in violation of his Due Process rights;
(4) owner failed to state a "class of one" equal protection claim; and
(5) district court properly stayed discovery while evaluating defendants' motion to dismiss.

Affirmed.

District court properly stayed discovery while evaluating defendants' motion to dismiss where, had the motion been granted, discovery would have been futile.

***233** On Appeal from the United States District Court for the Middle District of Pennsylvania (D.C. No. 06-cv-1715), District Judge: Honorable Yvette Kane.Don A. Bailey, Esq., Bailey, Stretton & Ostrowski, Harrisburg, PA, for Appellant.

***234** Robert G. Hanna, Jr., Esq., James D. Young, Esq., Lavery, Faherty, Young & Patterson, Harrisburg, Pa, Paul W. Minnich, Esq., Sean E. Summers, Esq., Barley Snyder, Donald B. Hoyt, Esq., Blakey, Yost, Bupp & Rausch, York, PA, for Appellee.

Before: RENDELL, FUENTES and JORDAN, Circuit Judges.

OPINION OF THE COURT

JORDAN, Circuit Judge.

**1 Emmett Mann appeals the District Court's order granting the motions to dismiss of defendants City of York (the "City"), its agents, and York College.[1] He also appeals the District Court's decision to stay discovery pending disposition of the motions to dismiss. We have jurisdiction under 28 U.S.C. § 1291 and will affirm.[2]

I. Background

Mann owned a house in York, Pennsylvania, which he rented to college students. In 2004 and 2005, York College sought to acquire property for additional student housing and thus approached Mann about selling his house. However, the parties could not agree on a sales price. At some later time, Mann's home was cited for code violations and declared "blighted" by the City.

The City initiated condemnation proceedings against Mann in the Court of Common Pleas of York County. Although Mann stipulated to the blight determination, he argued that the City and York College had conspired to harass and intimi-

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[1] The City defendants include John S. Brenner (Mayor), Don Hoyt, Matt Jackson, Dave Redshaw, Steven R. Buffington, Officer Wentz, and the Redevelopment Authority of the City of York. The York College defendants include York College and Robert A. Kinsley, a private contractor.

[2] The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

date him into selling his property for a reduced value. Mann accused the defendants of manipulating building codes and ordinance violations to bring improper charges against him, intentionally damaging his property, and lodging other unspecified false criminal charges against him. The Court of Common Pleas issued an opinion on October 6, 2006, in which it found the taking to be proper. It also concluded that the City had not acted in bad faith or committed fraud in pursuing condemnation proceedings against Mann. The condemnation concluded in May 2007, when Mann was paid $166,000 for his property.

Meanwhile, on August 31, 2006, Mann filed a complaint in the United States District Court for the Middle District of Pennsylvania, pursuant to 42 U.S.C. § 1983, in which he alleged that the defendants conspired to intimidate and harass him into accepting a significantly reduced price for his property. As Mann asserts, "[t]heir plan, plainly put, was to drive [me] crazy." (App.34.) The defendants filed motions to dismiss Mann's complaint, which the District Court granted, giving Mann leave to replead. The District Court instructed Mann on how to cure the deficiencies in his original complaint, and he subsequently filed two amended complaints. Mann's third version of the complaint, which was dismissed on the defendants' motions, is the subject of this appeal.

Mann's appeal ultimately boils down to two overarching issues. First, he contends that the District Court applied the wrong legal standard in assessing the motions to dismiss under Federal Rule of

Civil Procedure 12(b)(6), and then erred in *235 dismissing his claims under that standard. Second, he argues that the District Court improperly stayed discovery while it considered the defendants' motions to dismiss.

II. Discussion

We have plenary review over the question of whether the District Court applied the correct legal standard in evaluating the motions to dismiss. *Phillips v. County of Allegheny*, 515 F.3d 224, 230 (3d Cir.2008). We review "questions concerning the scope or opportunity for discovery" for abuse of discretion. *In re Orthopedic Bone Screw Prod. Liab. Litig.*, 264 F.3d 344, 365 (3d Cir.2001).

A. *Motions to Dismiss*

1. *Standard*

**2 In evaluating a motion to dismiss for failure to state a claim under Rule 12(b)(6), the District Court must accept the plaintiff's well-pleaded allegations as true and draw all reasonable inferences in his favor. *Phillips*, 515 F.3d at 231. The complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 234 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). Thus, to survive a motion to dismiss under Rule 12(b)(6), a plaintiff must allege facts sufficient to "nudge [his] claims across the line from conceivable to plausible." *Id.* (quoting *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955).

The District Court used the correct standard in evaluating Mann's claims. It dedicated an entire section of its opinion to discussing the proper standard under Rule 12(b)(6) and noted that a motion to dismiss should be granted when "taking all factual allegations and inferences as true, the moving party is entitled to judgment as a matter of law." (App.16.) The District Court recognized that the motions were governed by Rule 12(b)(6) as interpreted by the Supreme Court in *Twombly* and this Court in *Phillips* (*id.* at 15-16), and it continually referred to those principles in its discussion of each of Mann's claims.[3] Accordingly, there is no merit to Mann's contention that the District Court applied the wrong legal standard in evaluating the motions to dismiss.[4]

2. *Merits*

Mann also argues that even if the District Court used the correct legal standard, it erred in applying

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[3] Mann fails to cite either *Twombly* or the "plausibility" standard it ushered in, instead choosing to rely on the now defunct "no-set-of-facts" standard of *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) (Appellant's Br. at 22), which the Supreme Court squarely rejected in *Twombly*. *See Twombly*, 550 U.S. at 563, 127 S.Ct. 1955 (*Conley's* no-set-of-facts language "has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard").

[4] Even if the District Court had applied the wrong legal standard, that would not in itself entitle Mann to relief because our review of a motion to dismiss for failure to state a claim is *de novo*. *McTernan v. City of York, Pa.*, 577 F.3d 521, 526 (3d Cir.2009).

the standard to dismiss his claims. Specifically, Mann contends that he adequately stated a claim for relief on three grounds: (1) the defendants retaliated against him, in violation of the First Amendment, by imposing heftier fines after Mann "used legal process" to successfully defend himself against other fines; (2) the defendants maliciously prosecuted him in violation of the Fourth Amendment; and (3) the defendants violated his Fourteenth Amendment rights to due process and equal protection by using harassment and intimidation to "railroad [him] into a condemnation." (*Id.* at 41-42.)

***236** a. *First Amendment Retaliation*

[1] Mann's First Amendment retaliation claim is based on the assertion that, after he defended himself in court against $2,000 in fines for code violations, defendant Buffington cited Mann with another $2,000 in fines in retaliation for Mann's initial successful defense. To establish a First Amendment retaliation claim predicated on 42 U.S.C. § 1983, a plaintiff must prove the following elements: (1) he engaged in constitutionally protected conduct; (2) the defendant took adverse action sufficient to deter a person of ordinary firmness from exercising his rights; and (3) the adverse action was prompted by plaintiff's protected conduct. *Mitchell v. Horn*, 318 F.3d 523, 530 (3d Cir.2003).

Our review of the record leads us to agree with the District Court that Mann failed to properly allege a retaliation claim. Nowhere in Mann's third amended complaint does he allege facts that could

reasonably support the necessary "causal link" between his protected speech (successfully defending the initial fines) and the unlawful retaliation (an additional $2,000 fine). *Id.* Instead, Mann makes vague and conclusory allegations that he was assessed some unreasonable fine for some unspecified violation, in retaliation for "cho [osing] to use legal process as a way to protect and extend his rights." (App.50.) *See Ashcroft v. Iqbal*, __ U.S. __, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009) (a complaint must do more than allege a "mere possibility of misconduct;" it must show the pleader's entitlement to relief). These allegations fall far short of what is required to put the defendants on notice of the claims and the bases for them. *See Phillips*, 515 F.3d at 233 (under Rule 8(a), plaintiff must plead enough facts to provide the defendant "fair notice" of the claim and the " 'grounds' on which the claim rests") (citation omitted)); *Baraka v. McGreevey*, 481 F.3d 187, 195 (3d Cir.2007) (on a motion to dismiss, "we are not compelled to accept unsupported conclusions and unwarranted inferences, or a legal conclusion couched as a factual allegation" (internal citations and quotation marks omitted)). Accordingly, Mann has not established that he was unlawfully retaliated against in violation of the First Amendment.

b. *Malicious Prosecution*

**3 Mann next contends that defendants Buffington, Wentz, and Redshaw violated his Fourth Amendment right to be free from malicious prosecution by citing him with thousands of dollars in

fines and bringing other "frivolous criminal charges"[5] against him. To state a claim for malicious prosecution predicated on the Fourth Amendment, a plaintiff must demonstrate that (1) the defendant acted maliciously for a purpose other than bringing the plaintiff to justice when (2) he initiated a criminal proceeding (3) without probable cause (4) which ended in the plaintiff's favor, but (5) caused the plaintiff to suffer a deprivation of liberty consistent with a seizure. *Johnson v. Knorr*, 477 F.3d 75, 81-82 (3d Cir.2007).

[2] Even though on its third iteration, Mann's complaint wholly fails to allege that the defendants acted without probable cause in citing him for code violations. *See Estate of Smith v. Marasco*, 318 F.3d 497, 522 (3d Cir.2003) (an "essential element of a malicious prosecution claim" is that plaintiff prove lack of probable cause). Furthermore, Mann did not allege that he ***237** suffered a "deprivation of liberty consistent with the concept of a seizure" as a result of the criminal citation proceedings. *Johnson*, 477 F.3d at 82. The only deprivation Mann claims to have suffered is "legal fees, court costs, and interminable inconvenience." (App.38.) Such deprivations are insufficient to establish that Mann was the victim of a malicious prosecution under the Fourth Amendment. *See DiBella v. Borough of Beachwood*, 407 F.3d 599, 603 (3d Cir.2005)

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[5] As the District Court observed, "[a]lthough [Mann] was strongly encouraged to do so in the Court's previous order, [Mann] still does not identify the date, the forum, or specifically what charges were involved in these 'criminal charges.'" (App.18.)

(plaintiffs failed to state a § 1983 malicious prosecution claim because the inconvenience of attending trial was not a Fourth Amendment seizure; their travel was not restricted, they did not post bail, and they did not have to report to pretrial services). Accordingly, the District Court properly dismissed Mann's malicious prosecution claim.

c. *Due Process*

Mann alleges a violation of his substantive due process rights based on the defendants' unlawful agreement "to deprive [him] of his rights through the unlawful use of state authority as a way to coerce him into compliance with their wishes." (Appellant's Br. at 18.) Mann's due process claim that he was unfairly harassed into a condemnation proceeding is barred by the doctrine of collateral estoppel. Collateral estoppel applies when: "(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigating the issue was fully represented in the prior action." *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 249 (3d Cir.2006) (citations omitted). We have plenary review over a district court's decision regarding collateral estoppel. *Id.* at 248. Mann disputed only the identity of the issues prong in the District Court and now raises the additional argument that the issue was never actually litigated.

**4 [3] The Honorable Sheryl Ann Dorney presided over the condemnation proceeding in the Court of Common Pleas of York County. Judge Dor-

ney rejected Mann's precise argument that the defendants harassed and intimidated him into selling his property for an unreasonably low price. (App. 69 (describing Mann's argument that the City had "bad faith or tainted motive" in obtaining his property "for as nominal price as possible" and noting that "we fail to see how this argument is valid.").) Addressing Mann's contention that the City "acted in bad faith by acting in consort with York College to obtain the propert[y] as inexpensively as possible," Judge Dorney concluded that Mann had "not overcome the heavy burden to show that the [City] has committed fraud or an abuse of discretion." (*Id.* at 68-69.) This record makes clear that the identical issue[6] Mann ***238** seeks to raise

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[6] We have held that "[t]o defeat a finding of identity of the issues for preclusion purposes, the difference in the applicable legal standards must be 'substantial.' " *Raytech Corp. v. White*, 54 F.3d 187, 191 (3d Cir.1995). Judge Dorney evaluated Mann's claim under state condemnation law, which places a "heavy" burden on the plaintiff to prove that "the condemnor is guilty of fraud, bad faith or has committed an abuse of discretion." (App. 68 (quoting *Downingtown Area Sch. Dist. v. DiFrancesco*, 125 Pa.Cmwlth. 264, 557 A.2d 819, 820 (1989)).) Mann apparently asks us to evaluate his claim under a general due process rubric, which focuses on whether "the alleged harassment 'remove[d] or significantly alter[ed]' plaintiffs' liberty and property interests." *Thomas v. Independence Twp.*, 463 F.3d 285, 297 (3d Cir.2006) (citation omitted). Although we recognize that the plaintiff's burden is greater in the context of state condemnation law than in pleading a due process violation, we find that the issue addressed and resolved in the condemnation proceeding is "in substance the same" as Mann's due process claim. *Raytech Corp.*, 54 F.3d at 193. Both schemes require a court to decide whether the defendants engaged in unlawful conduct to deprive the plaintiff of his

on appeal was actually litigated in the state condemnation proceeding. Accordingly, to the extent that Mann seeks to relitigate whether the defendants unlawfully coerced him into selling his property for a nominal value, the issue is barred by collateral estoppel.[7]

Mann's complaint also raises, though not explicitly, a "class of one" equal protection claim. The Equal Protection Clause of the Fourteenth Amendment requires that similarly situated individuals be treated alike. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). An equal protection claim may be brought by a "class of one," an individual claiming "that [ ]he has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treat-

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property, and Mann has failed to persuade us that the legal standards are substantially different in this case. We therefore conclude that the identity prong is satisfied.

[7] Mann apparently concedes that he is collaterally estopped from relitigating whether the condemnation action was brought in bad faith. He states that Judge Dorney "decided (and quite correctly so) that the aforementioned misconduct was not relevant to the issue of the Condemnor having the power to take the subject property, nor did the obvious misconduct interfere with the procedure which eventually decided 'just compensation.' " (Appellant's Br. at 27.) However, Mann maintains that although "Judge Dorney decided properly on the condemnation issue," she failed to address "any civil rights issues which may have shared a possible commonality of facts." (*Id.*) For that reason, we address Mann's due process claim, as well as his retaliation and malicious prosecution claims.

ment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) (per curiam). To state a claim under the "class of one" theory, a plaintiff must show that "(1) the defendant treated him differently from others similarly situated, (2) the defendant did so intentionally, and (3) there was no rational basis for the difference in treatment." *Phillips*, 515 F.3d at 243 (quoting *Hill v. Borough of Kutztown*, 455 F.3d 225, 239 (3d Cir.2006)). In *Olech*, the Supreme Court upheld the plaintiff's claim that the village violated the Equal Protection Clause by arbitrarily demanding a 33-foot easement to connect her property to the municipal water supply while only demanding a 15-foot easement from other property owners. *Olech*, 528 U.S. at 565, 120 S.Ct. 1073. The Supreme Court later clarified that "[w]hat seems to have been significant in *Olech* [was] the complaint alleged that the board consistently required only a 15-foot easement, but subjected Olech to a 33-foot easement." *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 128 S.Ct. 2146, 2153, 170 L.Ed.2d 975 (2008).

[4] In his complaint, Mann sets forth general allegations that "he was subjected to unequal and unauthorized mistreatment on a selective basis because of the defendants['] unlawful desire for his property," in violation of his right to equal protection. (App.49.) Although he alleges that "[o]ther citizens are not treated in this fashion, particularly the political leaders of the City of York" (*id.* at 41), Mann fails to plead that he was treated differently than other similarly situated individuals, that is, other property owners of blighted structures in the

City of York. While *Olech* may not require plaintiffs to "identify in the complaint specific instances where others have been treated differently," *Phillips,* 515 F.3d at 245, the complaint is still deficient. Without any allegation regarding other blighted property owners, Mann simply cannot "nudge [his] claims across the line from conceivable to plausible." *Id.* at 234 ***239** (quoting *Twombly,* 550 U.S. at 570, 127 S.Ct. 1955); *see also Hill,* 455 F.3d at 239 ("class of one" claim failed because plaintiff, a Borough Manager, did "not allege the existence of similarly situated individuals-i.e., Borough Managers-who [the Mayor] treated differently than he treated [plaintiff]"). Mann's bald assertions that the defendants violated his right to equal protection because "he was selectively and vindictively cited and prosecuted by the City in an effort to force him into cooperation with York College" (App.44), "amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim." *Iqbal,* 129 S.Ct. at 1951 (citation omitted). Accordingly, the District Court properly dismissed Mann's equal protection claim.

B. *Discovery*

****5** [5] Mann contends that it was an abuse of discretion for the District Court to stay discovery while it considered the defendants' motions to dismiss.[8] In

[8] Mann urges us to apply dicta contained in our decision in *Alston v. Parker,* 363 F.3d 229 (3d Cir.2004), to determine that he was entitled to discovery before dismissal. The facts of *Alston* are easily distinguishable from those in the case at

certain circumstances it may be appropriate to stay discovery while evaluating a motion to dismiss where, if the motion is granted, discovery would be futile. *See Iqbal,* 129 S.Ct. at 1954 ("Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery."). That is precisely the case here. As laid out above, none of Mann's claims entitle him to relief. That, as Mann contends, he could have produced "a litany of facts" substantiating his claims (Appellant's Br. at 30), if he had more time to conduct discovery, misses the mark. *See Mitchell v. McNeil,* 487 F.3d 374, 379 (6th Cir.2007) (because plaintiffs' complaint failed to state a claim for relief, "it follows that the district court did not err in granting defendants' Rule 12(b)(6) motion before permitting discovery by plaintiffs"). A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a claim, and therefore may be decided on its face without exten-

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hand. For one, the plaintiff in *Alston* was *pro se* and a prisoner involuntarily committed to a psychiatric hospital. Furthermore, despite our recognition that "confined prisoner[s]" face difficulty in bringing civil rights actions "owing to their incarceration or institutionalization," we concluded that the district court did not err in failing to order discovery because "it is not essential at the pleading stage." *Id.* at 233 n. 6, 236. Moreover, the central holding of the case was that the district court improperly applied a stringent pleading standard that conflicted with Rule 8(a)'s notice pleading. *Id.* at 232 ("[T]he lack of discovery was not the real barrier blocking Alston's path to relief. Rather, it was the stringent pleading standard presupposed by the parties and the District Court."). Accordingly, we decline to extrapolate the reasoning of *Alston* to this case, brought by a represented party and properly evaluated under Rule 8(a)'s notice pleading standard.

sive factual development. *See Neitzke v. Williams*, 490 U.S. 319, 326-27, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989) (the purpose of Rule 12(b)(6) is to "streamline[ ] litigation by dispensing with needless discovery and factfinding"); *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir.1997) ("A motion to dismiss based on failure to state a claim for relief should . . . be resolved before discovery begins."); *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir.1987) (the idea that discovery should be permitted before deciding a motion to dismiss "is unsupported and defies common sense [because t]he purpose of F.R. Civ. P. 12(b)(6) is to enable defendants to challenge the legal sufficiency of complaints without subjecting themselves to discovery"). Accordingly, the District Court did not abuse its discretion in staying discovery pending resolution of the ***240** motions to dismiss.[9]

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[9] Mann suggests that the District Court should have granted him leave to amend his complaint. Because Mann was permitted to do so twice before the present motions to dismiss were filed, we think the District Court was well within its discretion in finding that allowing Mann a fourth bite at the apple would be futile. *See Phillips*, 515 F.3d at 245 (dismissal without leave to amend is justified where the amendment would be futile); *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1413 (3d Cir.1993) (district court may deny amendment based on "repeated failure to cure deficiencies by amendments previously allowed") (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)).

III. Conclusion

For the foregoing reasons, we will affirm the order of the District Court granting the defendants' motions to dismiss.

C.A.3 (Pa.),2010.
Mann v. Brenner
375 Fed.Appx. 232, 2010 WL 1220963 (C.A.3 (Pa.))

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No.

Supreme Court, U.S.
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In the

Supreme Court of the United States

LAWRENCE RUSTON, JANET RUSTON,

Petitioners,

– v. –

THE TOWN BOARD FOR THE TOWN OF SKANEATELES, PAUL "BILL" PAVLUS, THADDEUS ASTEMBORSKI, BARBARA SPAIN, DAVID G. LAXTON, THEODORE MURDICK, THE PLANNING BOARD FOR THE TOWN OF SKANEATELES, MARK TUCKER, JOSEPH SOUTHERN, KENNETH JONES, ALAN BRIGGS, LEWIS WELLINGTON, DESSA BERGEN, ROBERT LOTKOWICTZ, THE VILLAGE OF SKANEATELES, JOHN DOE, JANE DOE 1–20,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER-QUESTIONS PRESENTED

Whether a plaintiff asserting a class of one equal protection claim must satisfy the pleading standards announced in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), with respect to each of the elements including the factual basis for asserting the existence of "similarly situated" persons?

Whether the complaint herein was deficient on its face because the factual allegations of the complaint demonstrate that the purportedly similarly situated persons and entities and not similarly situated for purposes of an equal protection claim?

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STATEMENT OF THE CASE

Petitioners own a large parcel of property located outside the Village of Skaneateles (the "Village"), in the Town of Skaneateles (the "Town") and wished to construct 12 additional dwelling units on the property. In addition to zoning approvals required from the Town, Petitioners sought permission to connect those additional units to the Village sewer system. Pursuant to New York law, Petitioners had no right to such additional connections and the Board of Trustees possessed considerable discretion in entertaining such a request. *See, e.g., Kontokosta v. Village of Greenpoint*, 1991 WL 206296 (S.D.N.Y. 1991); *Ciaola v. Town of Ossining*, 272 A.D.2d 324, 324, 707 N.Y.S.2d 200, 201 (2d Dept.), *lv. denied*, 95 N.Y.2d 761, 714, N.Y.S.2d 711, 737 N.E.2d 953 (2000); *Heritage Company of Massena v. Village of Massena*, 192 A.D.2d 1039, 1040, 597 N.Y.S.2d 214, 215 (3d Dept. 1993); *Fraccola v. City of Utica Board of Water Supply*, 70 A.D.2d 768, 769, 417 N.Y.S.2d 357, 358 (4th Dept. 1979). Moreover, because a municipality possesses the paramount obligation to ensure that adequate sewer facilities are available to its residents, it cannot provide such services to nonresidents if the provision of such services possesses the potential to adversely affect the provision of such service to its residents and must discontinue such services if an insufficiency for its residents might exist. *See Town of Ithaca v. Village of Cayuga Heights*, 184 A.D.2d 78, 590 N.Y.S.2d 321 (3d Dept. 1992). Because of capacity issues, the Village denied Petitioners' request for the additional sewer hook-ups.

Petitioners instituted an action against the Village and the Town Defendants on or about August 1, 2006. The complaint asserted claims against the Village for: conspiracy to violate Petitioners' civil rights pursuant to 42 U.S.C. § 1985(3); substantive due process and equal protection. The District Court granted the Village's motion to dismiss the complaint. *See Ruston v. Town Board for Skaneateles*, 2008 WL 5423038 (N.D.N.Y. 2008). With respect to Petitioners' equal protection claim, the Court determined that the "single allegation" in the complaint regarding purported selective treatment was "insufficient to state a claim that Defendant Village treated others, with a high degree of similarity to Plaintiffs, differently." (55a). *Ruston*, 2008 WL 5423038 at 6. The Court permitted Petitioners to file an amended complaint with respect to their equal protection claim "because Plaintiffs may be able to plead sufficiently that Defendant Village treated similarly situated individuals differently." (57a). *Id.* at 7.

Petitioners filed an amended complaint asserting only a class-of-one equal protection claim as against the Village with respect to the claimed November 2004 denial of Petitioners' request for additional sewer hook-ups. The complaint identified various other properties to which Petitioners claim to be similarly situated. It was alleged that approval was granted to Edmonds in or about 1987 (83a) (16 years before the subject denial); the Skaneateles Country Club connection occurred "in the early 1990's" (82a); the Parker property was connected "for decades" (¶83a); the Bower property was connected in the late 1990's (83a); Ianno received a connection in 1998

(84a) and no time frame is provided for the Chase Design project (84a). Further, Petitioners wish to construct and sell 12 single-family homes on their 27-acre lake front property (61a) in addition to the existing units. It was alleged that Edmonds received permission to connect "a new home" (82a); the Skaneateles Country Club apparently is a traditional country club with no residential units (82a); an unspecified number of dwelling units, apparently one, is connected to the system from the Parker property (83a); Kennan erected " a brand new house" (83a), that is, one dwelling unit; the Bower property is a "spa"; the use of the Ianno property is not specified (84a); and the Chase Design property is alleged to be a "commercial building" apparently with no residential dwelling units (84a). The size of the foregoing purportedly similar properties is not alleged.

By Decision and Order dated September 30, 2009, the District Court granted the Village's motion to dismiss the amended complaint. The Court determined that:

> Plaintiffs' allegations in support of their equal protection claim against Defendant Village all relate to the decision to deny Plaintiffs sewer-system access for the proposed development. In its prior decision, this Court discussed the discretionary nature of the decision to grant sewer access when discussing Plaintiffs' previously asserted substantive due process claim against Defendant Village and concluded that Plaintiffs lacked a property interest because Defendant Village had discretion.

(20a). *Ruston v. Town Board for Skaneateles*, 2009 WL 3199194 at 2 (N.D.N.Y. 2009). Because a class-of-one equal protection claim may not be based on discretionary governmental action pursuant to *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591(2008), the District Court found that the complaint failed to state an equal protection claim as a matter of law.

Petitioners appealed the foregoing decisions to the Court of Appeals which, by Judgment dated July 8, 2010, affirmed the dismissal of the complaints. With respect to the applicable pleading standard, the Court determined that:

> The Supreme Court has recently clarified the pleading standard required to withstand a motion to dismiss. '[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.' *Ashcroft v. Iqbal*, ___ U.S. ___, ___, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009) (internal citation omitted). 'While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.' *Id.*; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 565-66, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

(10a), *Ruston v. Town Board for Skaneateles*, 610 F.3d 55, 58-59 (2d Cir. 2010).

The Court noted that:

> District courts in our Circuit differ as to the impact of this pleading standard on a 'class of one' equal protection claim. This uncertainty is attributable to the tension between [i] this Court's decision in *DeMuria v. Hawkes*, 328 F.3d 704, 707 (2d Cir.2003), which held under a now-obsolete pleading standard that a 'class of one' claim is adequately pled ('albeit barely' so) even without specification of others similarly situated, and [ii] the Supreme Court's recent clarifications, which require that a complaint allege facts sufficient to establish 'a plausible claim for relief,' *Iqbal*, 129 S.Ct. at 1950; *see also Twombly*, 550 U.S. at 566, 127 S.Ct. 1955.

(10a-11a), *Ruston*, 610 F.3d at 59.

The Court concluded that:

> We hold that the pleading standard set out in *Iqbal* supersedes the general allegation' deemed sufficient in *DeMuria*, 328 F.3d at 707. Under *Iqbal*, factual allegations must be sufficient to support necessary legal conclusions. *See Iqbal*, 129 S.Ct. at 1950-51. 'A court 'can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.' ' *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir.2010) (*quoting Iqbal*, 129 S.Ct. at 1950). 'We next consider the factual allegations in [the] complaint to determine if

> they plausibly suggest an entitlement to relief.' *Iqbal*, 129 S.Ct. at 1951; *see also Harris v. Mills*, 572 F.3d 66, 72 (2d Cir.2009).

(11a). *Id.*

Applying that standard, the Court found that the Petitioners had failed to state a claim against the Town because they did "not allege specific examples of the Town's proceedings, let alone applications that were made by persons similarly situated. The equal protection claim as to the Town defendants therefore fails for lack of factual allegations to support the legal conclusion." (11a-12a). *Id.* at 59.

However, with respect to the equal protection claim against the Village, the Court of Appeals determined that, consistent with a significant body of case law, the purportedly comparable "similarly situated" persons or entities upon which Petitioners premised their claim were not similarly situated as a matter of law. The Court related that "[C]lass-of-one plaintiffs must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves." (12a) *Id.* (*quoting Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir.2006)). The Court found that:

> Under this standard, none of the properties cited by the Rustons suffice: a house built in 1987; a country club that was renovated in 'the early 1990's'; two neighboring properties-'connected to the Village sewer system for decades'-that are not further described; a house built 'in or around 2004'; a 'luxury spa' built 'in the late 1990's'; and a 'large commercial building.' None of these

> properties is similar to the Rustons' proposed 14-home development, let alone so similar that no rational person could see them as different: some are commercial properties versus the residential properties at issue, *see Campbell v. Rainbow City*, 434 F.3d 1306, 1314-15 (11th Cir.2006) (properties that differed in land use were not prima facie similarly situated); *see also Clubside, Inc.*, 468 F.3d at 159, and the residential connections were single homes, not a new development as proposed by the Rustons, *see id.* at 159-60 (projects involving 'different types of housing and density levels' were not similarly situated as a matter of law).

(12a-13a). *Id.* at 59-60.

As a result, the Court of Appeals concluded that Petitioners failed to state a class of one equal protection claim.

REASONS FOR DENYING THE PETITION

Supreme Court Rule 10 provides that "[a] petition for a writ of certiorari will be granted only for compelling reasons. It is respectfully submitted that the petition should be denied because it fails to satisfy any of the permissible grounds for granting certiorari.

I. THE DICTATES OF *TWOMBLY* AND *IQBAL* ARE CLEAR

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), this Court abrogated the previous standard of *Conley v. Gibson*, 355 U.S. 41 (1957). Instead, "[t]o survive a motion to dismiss, a complaint must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Twombly*, 550 U.S. at 570. The Court confirmed the *Twombly* standard in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), and related that "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]'-'that the pleader is entitled to relief.'" *Id.* at 1950 (*quoting* FRCP 8(a)(2)).

Twombly requires that a complaint's "[f]actual allegations be enough to raise a right to relief above the speculative level...." *Twombly*, 550 U.S. at 555, and obligates a pleader to amplify a claim with factual allegations in those contexts where such amplification is needed to render the claim plausible. *See Livant v. Clifton*, 272 Fed.Appx. 113, 114 (2d Cir. 2008); *Jacobs v. Mostow*, 271 Fed.Appx. 85, 87 (2d Cir. 2008). "[T]he cases requiring such amplification are the rule, not the exception..." *Rosendale v. Bruise*, 374 Fed.Appx. 195, 196 (2d Cir. 2010).

"While legal conclusions can provide the framework for a complaint, they must be supported by factual allegations." *Iqbal*, 129 S.Ct. at 1950. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* at 1949 (*quoting Twombly*, 550 U.S. at 555). "Threadbare recitals of the

elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*(*citing Twombly*, 550 U.S. at 555). This Court has further determined that courts "are not bound to accept as true a legal conclusion couched as a factual allegation" *Id.* at 1950 (*quoting Twombly*, 550 U.S. at 555). Consistent therewith, "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.*

DeMuria v. Hawkes, 328 F.3d 704 (2d Cir. 2000), which was overruled by *Ruston*, concluded that a complaint asserting a class of one claim was not required to identify "actual instances where others have been treated differently for the purposes of equal protection." *Id.* at 707. The Court also noted that the plaintiff in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), did not "name names in her complaint, but made the more general allegation that similarly situated property owners had been asked for a different easement." *DeMuria*, 328 F.3d at 707. Based on *DeMuria* and its reasoning, Petitioners primarily base their petition on the claim that when the Second Circuit found that *Iqbal* had superseded *DeMuria*, it necessarily concluded that *Iqbal* overruled *Olech* with respect to pleading requirements for a class-of-one claim." (p. 15-16).

DeMuria, like *Olech*, were considered pursuant to the now abrogated standards of *Conley*. In fact, in sustaining the sufficiency of the complaint in *DeMuria*, the Court related the then-applicable standard as: "The court may not dismiss a complaint unless it appears beyond doubt, even when the

complaint is liberally construed, that the plaintiff can prove no set of facts which would entitle him to relief." *DeMuria*, 328 F.3d at 706 (*quoting Jaghory v. New York State Dep't of Educ.*, 131 F.3d 326, 329 (2d Cir. 1997)). The *DeMuria* Court utilized the identical standards as was announced in *Conley*, 355 U.S. at 45-46 ("a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."). That pleading standard now is inapplicable and a complaint must be analyzed pursuant to *Twombly* and *Iqbal*.

Petitioners assert that the Court should grant certiorari to determine "whether *Iqbal* did indeed render *Olech* dead letter law...." (p. 16). It is clear that acceptance of Petitioners' logic as a basis for granting certiorari would essentially mean that the Court should separately determine the effect of the pleading requirement of *Twombly* and *Iqbal* for each substantive area of law and presumably each statutory cause of action. Clearly, that is not the case. *Twombly* and *Iqbal* apply to all federal actions regardless of the basis for the claim. *See Twombly*, 550 U.S. at 554; *Iqbal*, 129 S.Ct. at 1953. Although, as acknowledged by *Iqbal*, the level of factual allegations sufficient to sustain a complaint will vary depending on the context, *see Iqbal*, 129 S.Ct. at 1950, it is clear that a complaint must plead enough facts to state a claim to relief that is plausible on its face and that bald conclusions do not satisfy the plausibly requirement of *Twombly* and *Iqbal*. Indeed, *Twombly* related that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief

requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. That requirement applies to complaints asserting a class of one equal protection claims, just as it applies to every other federal complaint. In alleging a class of one claim, a plaintiff may not simply assert that he or she was treated differently than other similarly situated persons.

It is respectfully submitted that the application of *Twombly* and *Iqbal* is apparent and that no need for clarification exists in the instant context.

II. NO CONFLICT EXISTS AMONG CIRCUITS REQUIRING RESOLUTION

Petitioners suggest that the Court should grant certiorari because "[t]he Second Circuit's post-*Iqbal* treatment of class-of-one equal protection pleading requirements stands in stark contrast to the Third Circuit's treatment." (p. 16). However, a review of the Third Circuit decisions cited by Petitioners reflects a thoughtful analysis of the Supreme Court's discussion of the issue by the Court, but fails to reveal a conflict in the ultimate conclusion of those decisions.

Petitioners rely on *Mann v. Brenner*, 375 Fed.Appx. 232 (3d Cir. 2010), as the purported basis for a conflict among the circuits, contending that "Mann's failure to name names was not why the court deemed dismissal appropriate. No, the court took for granted that *Olech* would protect a plaintiff who, awaiting discovery did not specify those persons more favorably treated though alike in circumstance."

(p. 17). In fact, Petitioners arguments and recitation of language from the decision substantiate that no conflict exists with the decision in *Ruston*.

Mann confirms that "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 235 (*quoting Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (*quoting Twombley*, 550 U.S. at 555)). The *Mann* Court additionally confirmed its reasoning in *Baraka v. McGreevey*, 481 F.3d 187,195 (3d Cir. 2007), that "we are not compelled to accept unsupported conditions and unwarranted inferences, or a legal conclusion as a factual allegation." *Mann*, 375 Fed.Appx. at 236. Specifically with respect to Mann's equal protection claim, the Court concluded that "[w]ithout any allegation regarding other blighted property owners, Mann simply cannot 'nudge [his] claims across the line from conceivable to plausible.'" *Id.* at 238-39 (*quoting Twombly*, 550 U.S. at 570). Petitioners' characterization of the rationale of *Mann* is inaccurate and the philosophy expressed therein is consistent with the reasoning of *Ruston* and adheres to the unambiguous dictates of *Twombly* and *Iqbal*.

Similarly, *Phillips v. County of Allegheny*, 515 F.3d 224 (3d Cir. 2008), decided after *Twombly* but prior to *Iqbal*, confirmed that "a plaintiff's [Rule 8] obligation to provide the 'grounds' of his 'entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 231 (*quoting Twombly*, 550 U.S. at 545). The Third Circuit determined that the Court had held in *Twombly* that "Rule 8 'requires a showing,' rather than a blanket assertion, of entitlement to relief." *Id.* (*quoting*

Twombly, 550 U.S. at 555 n.3). Additionally, the Court related that "without some factual allegation in the complaint, a claimant cannot satisfy the requirement that he or she provide 'fair notice,' but also the 'grounds' on which the claim rests." *Id.* at 232 (*quoting Twombly*, 550 U.S. at 555). As a result, the *Phillips* Court concluded that "[a]fter *Twombly*, it is no longer sufficient to allege mere elements of a cause of action; instead 'a complaint must allege facts suggestive of [the proscribed] conduct. *Id.* at 233 (*quoting Twombly*, 550 U.S. at 563). Lastly, after the Third Circuit considered the allegedly contradictory direction of the Court regarding Rule 8 and the plausibility requirement and the holding in *DeMuria*, it concluded that the *Phillips*' complaint failed to "contain specific allegations that he was treated differently." *Id.* at 245.

It is respectfully submitted that no conflict exists between the circuits which requires direction by this Court.[1]

---

[1] Petitioners' contentions that one should not "put much hope" in discovery to develop facts and uncover evidence and that one "is expected to have all the facts of her case at the start," are misplaced (p. 20). Initially, it is reckless for a plaintiff to institute an action, particularly a civil rights action, unless the plaintiff has a firm understanding of the factual underpinnings for the claim. One cannot assert bald, factless conclusion and hope to support such speculation in discovery. Contrary to Petitioners' plea, "Rule 8 ... does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 129 S.Ct. at 1950.

III. GUIDANCE REGARDING *IQBAL* IS UNNECESSARY

Petitioners contend that "the depth and breadth" of *Iqbal* remain unclear, advocating the granting of certiorari to elucidate its parameters (p. 21). As is related above, the directives of *Twombly* and *Iqbal* are abundantly clear and do not require clarification from the Court.

Petitioners refer to a number of decisions in which the courts discuss the interplay between Rule 8 and the requirements of *Twombly* and *Iqbal*. However, the dispute primarily is one of semantics and, it is submitted, it is difficult to credibly contend that the principles elucidated in those decisions are anything other than completely clear.

Petitioners selectively quote from *Swanson v. Citibank, N.A.*, 614 F.3d 400 (7th Cir. 2010), to suggest that the courts are unable to integrate Rule 8 and the dictates of *Twombly* and *Iqbal* (p. 21-22). However, a review of the entire decision confirms that the decision is not inconsistent with *Twombly* and *Iqbal*. For example, the Court concluded that a "plaintiff must give enough details about the subject-matter of the case to present a story that holds together." *Id.* at 404. Similarly, contrary to the implication asserted regarding *In re Insurance Brokerage Antitrust Litigation*, ___ F.3d ___, 2010 WL 3211147 (3d Cir. 2010), (p. 22), and consistent with *Twombly* and *Iqbal*, the Third Circuit related that:

> '[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic

> recitation of the elements of a cause of action will not do.' *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955 (quoting Fed.R.Civ.P. 8(a)(2)). Because Federal Rule of Civil Procedure 8(a)(2) 'requires a 'showing,' rather than a blanket assertion, of entitlement to relief,' courts evaluating the viability of a complaint under Rule 12(b)(6) must look beyond conclusory statements and determine whether the complaint's well-pled factual allegations, taken as true, are 'enough to raise a right to relief above the speculative level.' *Twombly*, 550 U.S. at 555 & n. 3, 127 S.Ct. 1955. The test, as authoritatively formulated by *Twombly*, is whether the complaint alleges 'enough fact[ ] to state a claim to relief that is plausible on its face,' *id.* at 570, 127 S.Ct. 1955....

2010 WL 3211147 at 9.

In *Arista Records LLC v. Doe*, 604 F.3d 110 (2d Cir. 2010), the Second Circuit determined that the dictates of *Twombly* and *Iqbal* did not represent a heightened pleading standard. Consistently, the Court concluded that "*Twombly and Iqbal* require 'factual amplification [where] needed to render a claim plausible...." *Id.* at 120 (*quoting Turkman v. Ashcroft*, 589 F.3d 542, 546 (2d Cir. 2009)).

As a result, guidance is not required to clarify the pleading requirements.

IV. CERTIORARI IS INAPPROPRIATE WITH RESPECT TO THE EQUAL PROTECTION ALLEGATIONS AGAINST THE VILLAGE

The foregoing discussion regarding the pleading jurisprudence relating to the equal protection claim asserted against the Village primarily is academic because the amended complaint relates the claimed factual predicate for Petitioners' claim. As is related at length above (p. 2-3, 6, 7). Petitioners alleged what they considered to be the factual basis for contending that the various properties to which they seek to compare themselves are similarly situated. However, consistent with well-established case law, the allegations of the amended complaint, on their face, demonstrate that the properties to which Petitioners seek to compare themselves are not similarly situated as a matter of law.

A lack of factual contentions is not the deficiency with respect to Petitioners' equal protection claim against the Village. Instead, the factual assertions demonstrate that an equal protection claim has not been stated because the purportedly similarly situated properties are not, on their face, sufficiently similar to assert a viable claim.

As a result, it is respectfully submitted, that the instant matter is, additionally, particularly inappropriate to consider the ramifications of *Twombly* and *Iqbal*.

CONCLUSION

It is respectfully submitted that, for the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 10-470

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IN THE

Supreme Court of the United States

LAWRENCE RUSTON, et ux.,

Petitioners,

VS.

TOWN BOARD FOR THE TOWN OF SKANEATELES, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether this Court's reliance on *Conley v. Gibson* in setting the pleading standards for an equal protection class-of-one claim in *Village of Willowbrook* v. *Olech* reasonably infers that this Court modified *Olech* when it overruled *Conley*.

2. Whether an equal protection class-of-one plaintiff must make specific factual allegations plausibly suggesting he is similarly situated to comparators in order to state a valid cause of action and show an entitlement to relief.

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INTRODUCTION

Like many other petitions this Court has likely received over the preceding two years, this petition involves a dissatisfied plaintiff arguing that this Court's recent reinterpretation of federal pleading principles in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) need "clarification" as applied to a particular cause of action—in this case, equal protection class-of-one.

However, in the context of an equal protection class-of-one claim, the new federal pleading principles are easy to apply and present little chance of posing problems for judges or litigants in the future. In *Village of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000), this Court applied boilerplate federal pleading standards without modification. When they became the *new* boilerplate, *Twombly* and *Iqbal*'s principles impliedly modified *Olech*.

In addition, there is no circuit split as to the effect of *Twombly* and *Iqbal* on equal protection class-of-one claims. The petitioners' attempt to present one is highly strained and relies on questionable case law. In reality, the federal circuits have been trending toward a uniform interpretation of the new pleading principles as applied to equal protection jurisprudence.

In sum, there is no need to revisit *Olech* in light of *Twombly* and *Iqbal*.

REASONS FOR DENYING THE PETITION

I. This Court Impliedly Modified *Olech* When it Expressly Overruled *Conley*.

The petitioners' primary contention is simple to answer. To the extent *Olech* articulated a pleading standard for equal protection class-of-one claims, *Twombly* and *Iqbal* certainly modify that standard. This Court left no question that the pleading principles it articulated in *Twombly* and *Iqbal* supersede the former principles in *Conley v. Gibson*, 355 U.S. 41 (1957). There is also no question that this Court expressly intended to apply *Conley*'s pleading principles to equal protection class-of-one claims. When *Twombly* and *Iqbal* retired *Conley*, elementary logic dictates that *Olech* must now be read in light of the new pleading principles.

In *Olech*, this Court granted certiorari for the primary purpose of deciding whether to expressly recognize an equal protection class-of-one action. Its discussion of the appropriate pleading standard—a secondary consideration—consisted of one simple paragraph:

> Olech's complaint can be fairly construed as alleging that the Village [of Willowbrook] intentionally demanded a 33-foot easement as a condition of connecting her property to the municipal water supply where the Village required only a 15-foot easement from other similarly-situated property owners. *See*

> *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) . . . These allegations . . . are sufficient to state a claim for relief under traditional equal protection analysis.

Olech, 528 U.S. at 565.

Olech's citation to *Conley* is key. At the time, *Conley* was the boilerplate pleading standard applicable to nearly all federal causes of action, permitting a claim to survive a motion to dismiss "unless it appear[ed] beyond doubt that the plaintiff [could] prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. at 45-46.

Twombly, of course, expressly retired *Conley*'s "no set of facts" standard and iterated a new principle that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions." 550 U.S. at 555. *Iqbal* expressly applied *Twombly* to all causes of action. 129 S.Ct. at 1953.

There is obviously no need to reinterpret *Olech*. Because *Olech* expressly cited *Conley*, and because *Conley* was expressly replaced by *Twombly* and *Iqbal*, therefore the new pleading principles also apply to equal protection class-of-one claims. Such a simple conclusion of law does not merit this Court's attention.

II. There is No Existing Circuit Split on the Question of Pleading Standards for Class-of-One Equal Protection Claims.

The petitioners' assertion that a circuit split exists on their question presented is labored and artificial. Although they claim the Third Circuit currently follows a different rule than the rule the Second Circuit adopted in the case below, the Third Circuit's own jurisprudence on that rule is far from well-established. In reality, the effects of *Twombly* and *Iqbal*, as evidenced by the lower court's holding, have helped mend—not create—an existing split across several federal circuit courts of appeals.

A. The "Circuit Split" the Petitioners Describe is Illusory.

The petitioners offered just one allegedly divergent jurisdiction: the Third Circuit, represented by the cases *Phillips v. County of Allegheny*, 515 F.3d 224 (3d Cir. 2008) and *Mann v. Brenner*, No. 09-2461 (3d Cir. Mar. 30, 2010). The petitioners touted both of those cases as proof that an equal protection class-of-one litigant in the Third Circuit would not need to plead specific instances of discriminatory conduct to survive a motion to dismiss on the pleadings. However, under even cursory scrutiny, those Third Circuit cases do not present a *bona fide* divergence between circuits worthy of this Court's examination.

The most recent of the two cases, *Mann*, is far too weak to create a circuit split. In *Mann*, the equal protection claim at issue was purely secondary to the

plaintiff's primary cause of action, and was not even explicitly pled as a class-of-one claim. *Id.* at *10. Additionally, the Third Circuit expressly marked the case "Not Precedential." As such, that court will resist citing it in support of any future decisions. 3d Cir. Internal Operating P. 5.7 (stating that the Third Circuit "by tradition does not cite to its not precedential opinions as authority. Such opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing."); *see also DiBella v. Borough of Beachwood*, 407 F.3d 599, 602 fn. 4 (3d Cir. 2005).

The other case the petitioners presented, *Phillips*, also does not create a *bona fide* circuit split. In *Phillips*, decided after *Twombly* but before *Iqbal*, the Third Circuit admitted that none of its prior jurisprudence had examined the pleading standards for equal protection class-of-one claims. 515 F.3d at 244. As a result, *Phillips* directly borrowed the pleading standards the Second Circuit had previously articulated in *DeMuria v. Hawkes*. *Id.* at 244-45 (citing 328 F.3d 704, 707 (2d Cir. 2003)). *Phillips* cited *DeMuria* while *DeMuria* was still good law. Since the lower court in this case expressly overruled *DeMuria*, the Third Circuit would likely pay close attention to that reversal in any future case involving pleading standards for class-of-one equal protection claims. And, in revisiting that issue, the Third Circuit would also need to recognize *Iqbal*—as well as three additional years of clarifying jurisprudence from all federal circuits affirming that a "threadbare" recitation of an element of a cause of action will not sustain it beyond a motion for dismissal. *Phillips* is dated precedent, based expressly on a reversed case,

and is therefore ripe for reversal itself. It would be presumptuous for this Court to recognize a circuit split until the Third Circuit recognizably affirms *Phillips*' rule in the face of contradictory precedent.

B. If Anything, the Second Circuit's Decision Below Helped Resolve a Circuit Split.

The Second Circuit's holding in the case below helped clarify case law, not confuse it. By reversing *DeMuria* and requiring factually-specific pleadings to show entitlement to relief, the Second Circuit mended a stark divergence in pleading standards for equal protection class-of-one claims that had existed for several years.

In 2001, not long after this Court handed down *Olech*, the First Circuit held in *Barrington Cove Ltd. P'ship v. Rhode Island Housing and Mortgage Fin. Corp.*, 246 F.3d 1, 8-9 (1st Cir. 2001) that an equal protection class-of-one plaintiff must plead enough specific facts to show that his property was "similarly situated" to comparator properties receiving allegedly differential treatment. The First Circuit held that a complaint must plead such facts with "reasonable particularity" and also held that conclusory pleadings would not suffice. *Id.* at 8.

And, in 2007, in a case decided shortly after *Twombly* but making no reference to it, the Eleventh Circuit held,

> [w]e see no reason that a plaintiff in a "class of one" case should be subjected to a more lenient "similarly situated" requirement than

> we have imposed in other contexts. Adjudging equality necessarily requires comparison, and "class of one" plaintiffs may (just like other plaintiffs) fairly be required to show that their professed comparison is sufficiently apt.
>
> * * *
>
> A "class of one" plaintiff might fail to state a claim by omitting key factual details in alleging that it is "similarly situated" to another.

Griffin Industries, Inc. v. Irvin, 496 F.3d 1189, 1204-05 (11th Cir. 2007) (deciding an appeal from a motion to dismiss). The Eleventh Circuit also indicated its rule was a direct extension of its pre-*Olech* equal protection jurisprudence. *Id.* at 1205 (citing *GJR Investments, Inc. v. County of Escambia*, 132 F.3d 1359, 1367-68 (11th Cir. 1998)).

By admittedly allowing "general allegation[s]" of a similar situation between a plaintiff and comparators, the Second Circuit in *DeMuria* stood directly at odds with two of its sister circuits. 328 F.3d at 707. That divergence existed for seven years, until the court below reversed the rule and brought consistency. *Ruston v. Town Bd. for the Town of Skaneateles*, 610 F.3d 55, 59 (2d Cir. 2010) (expressly overruling *DeMuria* and requiring an equal protection class-of-one plaintiff to "allege facts that 'plausibly suggest an entitlement to relief'"). By reversing its position, the Second Circuit joined a large block of federal circuits that apply comparable standards to equal protection class-of-one pleadings.

III. No Substantial Question Exists as to Whether *Twombly* and *Iqbal* Impliedly Require Factual Allegations in Equal Protection Claims.

Post-*Twombly* or post-*Iqbal* decisions from other circuits interpret those cases to require more than generalized conclusory pleadings. Several federal circuits now hold that a plaintiff must plead specific factual allegations to show a plausible entitlement to relief—both in class-of-one claims and traditional equal protection actions. *See, e.g.*, *Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 550 (6th Cir. 2007) (holding "to conclude that [the plaintiffs] allege that members of their class were treated differently from one another without their mentioning any such discriminatory treatment is both unreasonable and contrary to *Twombly* . . ."); *Robbins v. Oklahoma*, 519 F.3d 1242, 1253 (10th Cir. 2008) (holding that "[t]o cure the notice and plausibility problems with their equal protection claim, plaintiffs must provide additional facts to show their grounds for relief"); *Douglas Asphalt Co. v. Qore, Inc.*, 541 F.3d 1269, 1275 (11th Cir. 2008) (holding that "with respect to a class-of-one claim, we are obliged to apply the 'similarly situated' requirement with rigor . . . [the plaintiff] must identify an instance in which a similarly situated contractor completed its project without being subject to the same testing procedures . . .") (internal citations and quotations omitted); *see also Glover v. Mabrey*, No. 08-7048 at *27-28 (10th Cir. June 28, 2010) (holding that [the plaintiff] has failed to allege, as it must, the identity or characteristics of other similarly situated contractors and how those similarly situated contractors were treated differently").

Given that this area of the law is already trending toward uniformity, there is no need for this Court to reinterpret *Twombly* or *Iqbal*'s effect on the question presented.

CONCLUSION

The petitioners have not established any compelling issues worthy of this Court's review. The respondents respectfully request their petition be denied.

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175 (4)

No. 10-470

NOV 15 2010

IN THE

Supreme Court of the United States

LAWRENCE RUSTON, JANET RUSTON,

Petitioners,

— *v.* —

THE TOWN BOARD FOR THE TOWN OF SKANEATELES, PAUL "BILL" PAVLUS, THADDEUS ASTEMBORSKI, BARBARA SPAIN, DAVID G. LAXTON, THEODORE MURDICK, THE PLANNING BOARD FOR THE TOWN OF SKANEATELES, MARK TUCKER, JOSEPH SOUTHERN, KENNETH JONES, ALAN BRIGGS, LEWIS WELLINGTON, DESSA BERGEN, ROBERT LOTKOWICTZ, THE VILLAGE OF SKANEATELES, JOHN DOE, JANE DOE 1-20,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONERS' REPLY MEMORANDUM

They surely do not mean to, but, through their opposing briefs, the Respondents buttress Petitioners' argument for a writ of certiorari. For they themselves cannot agree on the answer to the simple question at the core of our petition: Did *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), overrule *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000)?

The Town Respondents brook no doubt. They are sure that *Olech* belongs to the past. They have ascertained that *Iqbal* "modified" *Olech* so to rob it of any precedential power as to class-of-one equal protection pleading. (Town Respondents' Brief in Opp. pp. 2-3).

True, the Town Respondents cannot point to explicit language in *Iqbal* (or subsequent decisions by this Court) that addresses *Olech*'s current vitality. Nor can the Town Respondents deny the value this Court has consistently placed on both *stare decisis* and clarity on those occasions when *stare decisis* must yield to changed conditions or improved understanding. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) ("Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007) (*Conley*'s "'no set of facts' language" "has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on

an accepted pleading standard."). Nonetheless, the Town Respondents are emphatic: *Olech* died when *Iqbal* was born. (Town Respondents' Brief in Opp. p.3).

The Village Respondent, in contrast, is flush with uncertainty. While emphatic that *Olech*'s status in *Iqbal*'s wake is unworthy of this Court's attention, it studiously avoids opining on that status. (Village Respondent's Brief in Opp. pp. 8-11).

The Village Respondent does advance arguments against the Court's settling *Olech*'s status. It argues, for instance, that Petitioners' logic would "essentially mean that the Court should separately determine the effect of the pleading requirement of *Twombly* and *Iqbal* for each substantive area of law and presumably each statutory cause of action." (Village Respondent's Brief in Opp. p. 10). Never mind that Petitioner urges clarification as to a single decision that expressly addresses pleading requirements attending enforcement of a constitutional provision unsurpassed in safeguarding individual rights. Never mind that *Iqbal* prescribes application of Rule 8 pleading requirements as "context-specific," not "trial-case-specific," thus making way for the Court's bringing to bear its own considerable "judicial experience and common sense," *Iqbal*, 129 S.Ct. at 1950, on case categories it deems distinctive in nature or importance.

The Village Respondent advances arguments against this Court's settling *Olech*'s status. But with none of them does the Village Respondent

dare assert outright that *Olech* stands or that *Olech* has been upended.*

In sum, the Town Respondents hold one view of *Olech*'s status, while the Village Respondent holds another. The Town Respondents commit to a position: *Olech* is dead. The Village Respondent hedges; it is agnostic, unable to stake a position (while adverse to guidance from this Court). The divergence between the Town Respondents and the Village Respondent itself cries out for this Court's clarifying intervention.

Dated: November 12, 2010

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* Nor does the Village Respondent begin to account for *Ruston*'s reliance on *Clubside, Inc. v. Valentin*, 468 F.3d 144 (2nd Cir. 2006). The Village Respondent, citing and excerpting *Ruston*, 610 F.3d 55, 59-60, underscores that reliance. (Village Respondent's Brief in Opp. pp. 6-7). Yet neither the Village Respondent nor the Town Respondents ever dispel the impression that *Ruston* evinced post-*Iqbal* confusion by drawing on *Clubside*, a summary judgment case, to affirm a district court's Fed.R.Civ.P. 12(b)(6) dismissal.

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